

***United States Court of Appeals
for the
District of Columbia Circuit***



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DISTRICT OF COLUMBIA
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Court of Appeals, District of Columbia

OCTOBER TERM, 1926.

No. 4535.

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JAMES R. CATON, ROBERT BRUCE EMERSON and WILLIAM
H. EMERSON, Administrators of the Estate of W.
R. EMERSON, Deceased; CORA HAMILTON KNOX, Ex-
ecutrix of the Estate of W. S. KNOX, Deceased, *et*
al., Appellants,

vs.

AMERICAN SECURITY AND TRUST COMPANY, Executor and
Trustee, *et al., Appellees.*

**BRIEF FOR CERTAIN APPELLANT LEGATEES
UNDER ITEM EIGHTEEN OF WILL OF
CHARLES E. WOOD.**

ROGER J. WHITEFORD,
JOHN J. HAMILTON,
HENRY C. CLARK,
Attorneys and Counsel for
Aforesaid Legatees.

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BRIEF FOR CERTAIN APPELLANT LEGATEES
UNDER ITEM EIGHTEEN OF WILL OF
CHARLES E. WOOD.

STATEMENT OF THE CASE.

The American Security and Trust Company, as executor of and trustee under the will of Charles E. Wood, deceased, presented a petition to the Supreme Court of the District of Columbia, holding a probate court, praying for instructions "as to whether peti-

tioner shall pay interest on the legacies bequeathed by Item Eighteenth of the will, and, if so, at what rate, from what date and to what date.” (R. 11 to 24)

The will of Charles E. Wood is set forth in full in the record (R. 1 to 10). Item Eighteen of this will contains eighty-eight bequests of specified sums of money to designated individuals. These bequests aggregate \$201,000.00, considering the principal of the bequests alone. Omitting the names of the beneficiaries and the respective amounts given to each, this Item of the will reads:

“Item Eighteenth: I give and bequeath out of the rest and residue of my estate, over and above the legacies hereinbefore mentioned and the trusts hereinbefore created, the following sums of money to the personal friends, and old and faithful employees of the firm of Wood, Harmon and Company, as follows: * * * And should the rest and residue of my estate prove insufficient to pay all the legacies mentioned in this item of my will in full, then I direct that the said legacies shall be scaled down sufficiently to give to each legatee under this item of my will a proportionate share of whatever amount there may be left of my estate for such purpose.” (R. 6 to 8)

These legacies prescribed the fund out of which they are to be paid, this fund being “out of the rest and residue of my estate, over and above the legacies hereinbefore mentioned and the trusts hereinbefore created.” These legacies are a charge upon this fund, and obviously take precedence over any subsequent bequests or gifts found in a later paragraph of the will.

Item Eighteen of the will is not confused or intertwined with any other paragraph of the will.

Preceding this paragraph the testator has reposed ample powers in his executor to manage and dispose of his estate (Item Three of the Will; R. 1); has generously provided for his wife (Items Four to Seven, inclusive; R. 2 and 3); and has remembered such of his relatives as he desired, showing care and thought and explaining his motives in so doing (Items Eight to Ten and Item Twelve; R. 3 to 5); has remembered a close personal friend and also a son of this friend (Item Thirteen; R. 5); and in Items Fourteen and Fifteen provides, *and the provisions are expressly limited to the PRECEDING items of the will:*

“Item Fourteenth: Should it be impossible for my executor hereinafter named to pay the legacies hereinbefore mentioned within the time given by law for the settlement of my estate, then it is directed to pay them as soon as it is possible for it to do so, together with interest on the said legacies at the rate of five per centum from the expiration of the legal period within which my said executor is required to make settlement, until paid. It being my desire under all circumstances, however, that the devises and bequests made to and for the use and benefit of my beloved wife, Eurnie I. Wood, shall have preference in payment both as to principal and interest.

“Item Fifteenth: Should the rest and residue of my estate after the payment in full of my debts and funeral expenses and the devises and bequests made to and for the use and benefit of my beloved wife, Eurnie I. Wood, prove insufficient to pay all the other legacies hereinbefore mentioned in full, then I direct that the said legacies be scaled down sufficiently to give to each legatee a proportionate share of whatever amount there may be left for such purpose.” (R. 5-6)

This review of the will has brought us only through Item Fifteen thereof. Item Sixteen is a further provision for the benefit of testator's wife (R. 6). Item Seventeen directs that "out of the rest and residue of the estate" a family monument be erected (R. 6).

The next item of the will is the one which gives the legacies under consideration. The scheme of the testator is laid bare by following through the will item by item. There is no confusion or interrelation of the items one to another except the provisions creating a definite *sequence of payment*. The first and foremost purpose of the testator is to provide for his wife. Should the estate not prove sufficient to meet the gifts to the wife, all other gifts must fail. This the testator declared.

The testator then expressly declared his preference with respect to his relatives other than his wife and with respect to his close personal friend. All this is set forth before Item Seventeen is reached. Unless the gifts made in the first sixteen items of the will are paid in full "with interest on the said legacies at the rate of five per centum from the expiration of the legal period within which my said executor is required to make settlement, until paid" (Item Fourteen; R. 5), the provisions for a family monument in Item Seventeen must fail, as well as the legacies in Item Eighteen and the gift mentioned in a subsequent paragraph.

If, however, the estate proves ample to satisfy all gifts in full as set forth in the first sixteen items, and if the estate proves ample also to erect the family monument mentioned in Item Seventeen, then the gifts set forth in Item Eighteen do not fail.

To what extent the legacies in Item Eighteen must be paid is the question before the court. This question

is answered by the testator in that he declares they must be paid in "full." The testator's requirement that these legacies must be paid "in full" is given double emphasis since this requirement is found both in the concluding sentence of Item Eighteen and also in the opening clause of Item Nineteen of the will. (R. 7-8)

Item Nineteen of the will is a gift to the "J. G. Kellogg Sanitarium" (R. 8). This gift must fail, however, unless all preceding gifts are paid in full. Item Nineteen presents testator's *least preferred beneficiary*, and if valid, takes only what is *left over*, while, if invalid, this *leftover* may pass under the intestate laws, obviously something not contemplated by the testator.

Item Twenty is an indefinite paragraph of suggestions to the executor, this item together with Item Twenty-One reposing "full discretion and power" in the executor in the settlement of testator's estate (R. 8-9).

The only interrelation of the various gifts made by this will is one of sequence in their payment. As payment of particular gifts is made in accordance with the prescribed scheme, the gifts paid are discharged and satisfied, and the executor must then attend to the satisfaction of the gifts next in order for payment.

When in following out this scheme all gifts in the first seventeen paragraphs of this will had been discharged and satisfied, and not until then, did the executor find itself confronted with the question herein raised. This fact portrays with peculiar emphasis the independent status of the Item Eighteen legacies.

Certain claimants of the portion of the estate which will remain after settlement of the Item Eighteen leg-

acies object to interest being allowed on these legacies. See answer of certain heirs at law and next of kin (R. 35 to 38), and answer of Michigan Sanitarium and Benevolent Association (R. 38 to 42). Other of the heirs at law and next of kin have answered that they are willing that interest be paid on the Item Eighteen legacies. See answer of William E. Harmon (R. 42 to 44), and answer of Clifford B. Harmon (R. 44 to 49).

The lower court decided that no interest should be allowed on the Item Eighteen legacies (R. 59). In reaching this conclusion the court below prepared an opinion in which Item Eighteen of the will was treated as being so confused and intimately interrelated with the other paragraphs of the will that these other paragraphs deprived the Item Eighteen legacies of interest, even though there were ample funds with which to pay this interest. The lower court declared that Item Three of the will prohibited a sale of certain stock belonging to the estate (R. 42) until this stock could be sold for par, but overlooked the unlimited discretion fixed by Items Twenty and Twenty-One of the will in the executor in the matter of sale of assets and settlement of all details of the estate (R. 8-9). The court also observed that to allow interest would seriously affect the sanitarium to be erected, as described in Item Nineteen of the will, overlooking that this sanitarium was the least preferred of all beneficiaries and took nothing until the Item Eighteen legacies had been paid "in full." The court in its opinion concluded that it was not testator's intention that the Item Eighteen legacies should receive interest, and carried its view of testator's intention into a decree accordingly. (R. 51 to 59)

The case is before this court on an appeal from the decree so entered.

This brief is filed on behalf of all of the legatees under Item Eighteen of the will of Charles E. Wood, deceased, excepting only Cora H. Knox, executrix of the estate of W. S. Knox, deceased, and J. Barrett Carter, trustee of the estate of Frank K. Raymond, bankrupt.

ERROR RELIED UPON.

The error of the Supreme Court of the District of Columbia in holding that the legatees under Item Eighteen of the will of Charles E. Wood, deceased, are not entitled to interest on their respective legacies (R. 6).

ARGUMENT.

I.

The legacies under Item Eighteen of this will are demonstrative, pecuniary legacies.

The classification to be applied to the legacies under consideration depends upon an analysis of the sequence of payment found in the will. Item Eighteen is not a residuary clause in this will. Items Eight, Nine, Ten, Eleven, Thirteen, Fifteen, Seventeen, Eighteen, and Nineteen each purport to be gifts "out of the rest and residue of my estate." A glance at these items will show that only Item Nineteen was created as the real residuary clause in this will. The residue of an estate is "that which remains after discharging all legal and testamentary claims on the estate." (28 R. C. L. 296)

"A *residuum, ex vi termini*, is that which remains after particular legacies are settled." Chief Justice Marshall in *Silsby vs. Young*, 3 Cranch 249, 264, 2 L. Ed. 429, 434.

The gifts in Item Eighteen are demonstrative legacies, in that they indicate the fund out of which they are to be paid, this fund being, "out of the rest and residue of my estate, over and above the legacies hereinbefore mentioned and the trusts hereinbefore created." (R. 6)

In *Kenaday vs. Sinnott*, 179 U. S. 606, 618, 45 L. Ed. 339-345, the court describes the different kind of legacies, quoting from *Williams on Executors*:

"*Williams on Executors* says in reference to the different kinds of legacies that, 'a legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate, which is so distinguished. * * * A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity *in the nature* of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is called by the civilians a *demonstrative* legacy; and it is so far general, and differs so much in effect from one properly specific, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific, that it will not be liable to abate with *general* legacies upon a deficiency of assets.' "

The case of *In re Union Trust Company of New York*, 161 N. Y. Supp. 954, passes upon a will which contained more than one clause making gifts "out of the residue." It was held that only the last of these gifts constituted the true residuary clause, and that a prior legacy given "out of the residue" then re-

maining was a demonstrative legacy. The first head note to this case reads:

“The clause following specific legacies, and one giving one-half of all the rest, residue and remainder, giving ‘out of the residue’ then remaining a certain amount in trust, is not a residuary clause but rather a demonstrative legacy; a subsequent clause, giving all the rest, residue and remainder, being the only true residuary clause.”

II.

Item Eighteen is not to be cut down by construction depending upon other and distinct paragraphs of the will.

The error of the lower court consists chiefly in a failure to recognize this rule. We have endeavored to demonstrate the sequence of the payment of gifts which is created by the will. This sequence is definitely prescribed by the testator. Testator's scheme of preference and sequence is composed of at least four clearly marked and distinctly separated stages:

1. The Testator's first care is that the gifts to his wife be settled in full.
2. Next are expressly preferred certain relatives and a particular personal friend.
3. Testator remembers a large number of old and faithful employees.
4. After each preceding gift has been paid in full, testator announces his intention concerning the disposition of any residue which may be left over.

In prescribing the foregoing sequence the testator disassociated the gifts, and grouped them under dis-

tinct degrees of preference. There is no connection between these groups other than mere order or sequence of payment. The testator did not throw all his gifts into a hodge-podge. This he carefully avoided. By his very scheme or sequence of disposition he expressly declared that each respective group of gifts should stand or fall by itself.

This scheme must be carried through so far as the assets will permit. The stages of the sequence must be taken care of in the order enumerated; they cannot be settled in any other order.

In taking up settlement of the Item Eighteen legacies we are in the position of passing upon a will from which all items dealing with the prior gifts have been settled and eliminated, and after being so eliminated, these same prior items cannot be used to cut down the *quantum* of the Item Eighteen legacies so long as there are ample funds with which to pay these legacies.

There is no conflict, inconsistency or repugnancy whatsoever between the various paragraphs of this will. This being so, an artificial and supposed inconsistency, based upon a mere surmise of what testator may have perhaps intended is not to be indulged in.

An attempt is made to limit the gifts in Item Eighteen by an implication drawn from *prior* paragraphs of the will. The cases hold that this cannot be done by implication from subsequent paragraphs, and *a fortiori* such implication cannot arise from prior paragraphs.

A particularly apt discussion is found in the quotation from Lord Chancellor Brougham announced in an appeal before the House of Lords and quoted by the Court of Appeals of Virginia, *Barksdale vs. White*, 28 Gratt. 225, 231, 26 Am. Rep. 344:

“ ‘My Lords, I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed, in one part of an instrument, by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt, in order to reverse that opinion to which the terms would of themselves and standing alone have lead, it is not sufficient that you should raise a mist, it is not sufficient that you should create a doubt, it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way; and that the interest first given cannot be taken away either by *tacitum*, or by *dubium*, or by *possibile*, or even by *probabile*; but that it must be taken away, and can only be taken away, by *expressum et certum*.’ 2 Clarke & Finn, R. 22, 36.”

This court in *Montgomery vs. Brown*, 25 App. D. C. 490, 494, recognized the foregoing principles and quotes from *Freeman vs. Coit*, 96 N. Y. 63, after referring to the possibility of one clause being limited by another:

“There is another rule of construction of equal force, and not inconsistent with the one just stated, and that is that when an interest is given or an estate conveyed in one clause of an instrument, it cannot be cut down or taken away by raising a doubt from other clauses but only by express words or by clear and undoubted implication.”

In *Johns Hopkins University vs. Garrett*, 128 Md. 343, 97 Atl. 640, the Court of Appeals of Maryland announced the rule to be:

“That where an estate is given in clear and decisive terms, such estate cannot be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by any inference therefrom, nor by any subsequent clause, nor by any inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate.”

In this case the Maryland Court referred to the painstaking and careful endeavor of the trial judge to construe the will there in question and arrive at the testator's intent. The Appellate Court, however, concluded that the decision of the trial judge was based upon an improper view, held that the testator must be assumed to have known the law applicable to wills and reversed the decree below principally because of the failure of the trial judge to give proper recognition to the principle under discussion.

In *Bailey vs. Sanger*, 108 Ind. 264, 267-268, 9 N. E. 159, it was contended that there was an interrelation between two clauses of the will which caused one to limit the other. The court held that this was not true. The following quotation will show the facts and view of the court:

“The first clause of the will is reasonably plain and unambiguous. By its terms the testator devised to his wife a life estate in one-third of the lands therein mentioned, with remainder over upon the death of his wife to his daughter. If the life estate of the wife was carved out of the one-third only, the remainder over to the daughter related to the one-third out of which the life estate had been taken. The estate in remainder is to be confined to the lands out of which the prec-

edent estate had been carved. Thus, by the first item of the will, a complete disposition was made of the undivided one-third of the testator's land.

"By the second clause, the title to the undivided two-thirds which so far remained untouched by the testament, was devolved upon the testator's daughter, at his death, contingent upon the death of the daughter before the decease of the testator's widow; and upon the further contingency that at the death of the widow the daughter should have no living child or children, the title to the share 'above devised' was to vest in the father and mother of the testator, or the survivor of them, or in the event of the death of both, then in his brothers and sisters."

* * * * *

"In our opinion the two clauses of the will, above set out, are entirely independent of each other. Each clause creates an estate in the several devisees therein named. There is no apparent design to connect them, nor are they united grammatically, or by the expression of a common purpose. In such a case each must be considered and construed separately, and without relation to the other, even though it may be conjectured that the testator had the same intention in regard to both. 3 Jarman Wills, p. 708." (Italics ours)

* * * * *

"The second clause deals exclusively with the remaining two-thirds. After devising the two-thirds to his daughter, the language is, after reciting certain apprehended contingencies, 'then the share of said property above devised to my said daughter is hereby devised and bequeathed to my father,' etc. In our opinion this excludes the idea that it was the purpose of the testator to deal with anything in the second clause except the very subject then before him, namely, the undivided two-thirds."

The Supreme Court of Mississippi quotes with approval from this Indiana case, and in *Harvey vs. Johnson*, 111 Miss. 566, 573, 71 So. 824, adds the following:

“Where two clauses of a will create an estate in several devisees named, and they are not united grammatically by the expression of a common purpose, each clause must be considered and construed separately, and without relation to the other, even though the testator may have had the same intention in regard to both.”

“In all wills the cardinal rule of construction is of course to ascertain the intention of the testator. Where, however, the terms of a will are expressed in words of clear and unambiguous meaning, there is no room to resort to other parts or items of it for construction. It is only in cases of ambiguous or doubtful meaning in the construction of one item of a will where resort should be had to the whole will in order to ascertain clearly the intention of the testator.”

The first head note of *Sands vs. Waldo*, 165 N. Y. Supp. 654, reads:

“Where one estate is given by one part of a will in clear and decisive terms, it cannot be taken away or cut down by a subsequent clause, not as clear and decisive as the clause creating the estate.”

In *In re Campbell*, 27 Utah 361, 365, the rule is thus stated:

“Where the intention of the testator in respect to a particular matter is clearly expressed by the terms of the will, ‘any subsequent expression of intention by the testator must, in order to limit’ the prior expression of intention, ‘be equally clear

and intelligible, and indicate an intention to that effect with reasonable certainty.' ”

We quote from *Goffe vs. Goffe*, 37 R. I. 542, 552, 94 Atl. 2, Ann. Cas. 1916 B, 240:

“The law upon this point is well stated in 30 *Am. & Eng. Enc. of Law*, 687, as follows:

‘It has become a settled rule of construction that when words of the will in the first instance distinctly indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provision which is ambiguous or inferential and which is not equally as distinct as the former; or the rule may be stated that a clear gift is not to be cut down by anything which does not, with reasonable certainty, indicate an intention to cut it down.’ ”

The Supreme Court of Appeals of West Virginia in *Smith vs. Ledsome*, 95 W. Va. 429, 437, 121 S. E. 484, decided in 1924, used this language:

“As was said by Judge Poffenbarger in *Martin vs. Martin*, 51 W. Va. 391; where an estate is conveyed by one part of a will it cannot be cut down by raising a mist of doubt from another part. ‘Where a former clause is express and particular, no subsequent clause shall be permitted to enlarge it if the two clauses can stand together. Where a testator, in the disposal of his property, overlooks a particular event or matter which, had it occurred to him, he would have probably guarded against, the court will not employ or insert the necessary clause for the purpose of supplying the omission, and, though the inference of intention be more or less strong, yet if it is not necessary or indubitable, the court will not aid the supposed

intention by adding or supplying words.' *Creswell vs. Lawson*, 7 Gill. & J. 227. And in no case where the words used are plain and unambiguous is a transposition to be made in order to create a meaning or construction different from that which they naturally had as written. *Graham vs. Graham*, 23 W. Va. 36."

In *Knight's Estate*, 91 Neb. 127, the court declared:

"We think the fact that the will gives two other specific legacies with express provisions that 'he (the executor) shall in no event allow any interest thereon,' and that no such limitation is placed upon the legacy in question, justifies the finding of the trial court that this legacy should bear interest after the first year of administration, if not realized during that time."

III.

The intention of the testator which controls is that expressed in the will.

While the cardinal rule for the construction of wills is the intention of the testator, a rule of even greater importance is that this intention must be expressed in the will and not be the conjecture of a court concerning what testator had in his mind.

A recent and conspicuous illustration of a court undertaking by conjecture to decree what a testator intended is found in *Boal vs. Metropolitan Museum of Art*, 292 Fed. 203, in which Judge Learned Hand by a carefully prepared opinion announced what he considered to be testator's intention. The United States Circuit Court of Appeals for the Second Circuit, on appeal, *Boal vs. Metropolitan Museum of Art*, 298 Fed. 894, 901-902, reversed the District Court and said:

“In the court below judgment was entered not in accordance with the intention of the testator as he expressed it in the will, but in accordance with the intention which the District Judge conjectured he had. A will is never to be construed by mere conjecture as to the testator’s intentions.”

Section 1626 of the Code of Laws of the District of Columbia is a clear and emphatic statute requiring all wills to be in writing. This section reads:

“Form of Will and Revocation.—All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; and, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests shall remain and continue in force until the same be burned, canceled, torn, or obliterated by the testator or by his direction in the manner aforesaid, or unless the same be altered or revoked by some other will, testament, or codicil in writing, or other writing of the testator signed in the presence of at least two witnesses attesting the same, any former law or usage to the contrary notwithstanding.”

In *Wright vs. Denn*, 10 Wheat. 204, 239, 6 L. Ed. 303, 312, Mr. Justice Story pertinently said:

“We may indulge conjectures; but the law does not decide upon conjectures, but upon plain, rea-

sonable and certain expressions of intention found on the face of the will.”

In *Brown vs. Wells*, 45 App. D. C. 428, it is pointed out that in view of the statutory requirement that a will shall be in writing, the intent of the testator must be gathered from the language employed in the will itself.

The second head note of *Swann vs. Swann's Executor*, 136 Va. 496, 117 S. W. 858, reads:

“The intention of the testator must be derived from what the testator has actually said, and not from what it may be supposed he intended to say.”

The Supreme Court of Oregon in *In re Johnson's Estate*, 100 Ore. 442, 157-158, 196 Pac. 385, said:

“A will cannot be construed by a mere conjecture as to the intention of the testator; but it is the intention which the testator expresses in his will that controls, and not that which he may have had in mind or which is manifested by some other paper not a part of the will.”

The three head notes of *Fowler vs. Mercer's Executor*, 170 Ky. 353, 185 S. W. 1117, read:

“A will being explicit and the meaning of the language used not being obscure, rules of construction meant to elucidate cannot be employed to contradict the terms of the will.”

“That the plain and unambiguous provision made by a will does not accomplish what was expected of it by the testator, affords no reason for enlargement under the guise of construction of the only provision made.”

“Courts are not authorized to give to a will any construction other than that which is justified by a

fair interpretation of the wording and language of the will itself, even though they may be of the opinion that testator did not intend to say what he did say."

The Supreme Court of Pennsylvania in *Ludwick's Estate*, 269 Pa. 365, 371, 112 Atl. 543, said:

"We conclude therefore, as already stated, that a situation has arisen which testator did not contemplate and for which he did not provide. Doubtless like most parents he supposed his son would survive him, and would be competent to and would in fact accept or refuse. That William would be incompetent to 'refuse,' probably never occurred to testator, certainly he did not provide for it. We might guess as to his intent, but, no matter which way we conclude, we would do violence to the language actually used, and this we are not permitted to do, since *the 'question in expounding a will is not what the testator meant but what is the meaning of his words.'*" (Italics ours)

IV.

Item Eighteen legacies entitled to interest.

It is important to ascertain at what time the question shall be determined, how much is payable under these Item Eighteen legacies. Chief Justice Marshall in *Silsby vs. Young*, 3 Cranch 249, 264, 2 L. Ed. 429, 434, has settled this. His words may be aptly applied to these legacies:

"It has been argued that the words of the will limit this charge on that legacy to the contingency of an insufficiency of assets at the death of the testator. The words are, 'It is my will and desire, that if the personal estate, and the produce arising from the real estate, of which I shall die

seized and possessed, shall not be sufficient to answer the several annuities and legacies herein before by me bequeathed, then, and in such case, I direct that the annuities and legacies shall not abate in proportion, but that the whole of such deficiency, if any there be, shall be deducted out of the said sum of 1,500 l. herein before by me bequeathed to my said nephew, Enoch Silsby.'

"These words have undergone a very critical examination, and it has been contended that the time at which the sufficiency mentioned in the will is to be determined is fixed by the testator at his death, in like manner as if the expression had been, 'if my estate shall not, at the time of my death, be insufficient,' etc. But the words do not appear to the court to demand such an interpretation. The words, 'the personal and real estate of which I shall die seized and possessed,' are no more in substance than the words 'all my real and personal estate' would have been. They describe the subject, on the insufficiency of which an abatement of a particular legacy is to take place, but not the time when that insufficiency is to be tested. *In the opinion of the court, that time is when the will is carried into execution, by the application of the funds to their object.* If, when that application is made, a deficiency appears, 'then, and in that case' it is, that the abatement is to take place in the specific legacy to Enoch Silsby.'" (Italics ours)

It cannot be disputed that the Item Eighteen legacies are pecuniary legacies. In 1890 it was settled for the District of Columbia by the case of *Powell vs. Drake*, 19 D. C. 334, that:

"In this District pecuniary legacies bear interest at six per cent from one year after the tes-

tator's death; and this although by reason of litigation their payment be longer delayed."

The opinion of the court which was announced by Mr. Justice Hagner elucidates the reasons which convinced the court:

"This rule is adopted for the benefit of the legatee, 'and follows,' as was said in 106 Mass, 591, '*as an accretion to the principal legacy.*' (Italics ours)

"General legacies are preferred to residuary legacies and are never to abate in their favor, and will be paid in full, although it may exhaust the assets and destroy the claim of the residuary legatees. Neither should interest upon them be denied in favor of those claiming under the residuary clause."

"The cases show that if there had been a total loss of income from the investments during the period, the pecuniary legacies would still bear interest; and it matters not how prolonged may be the contest that delays the payment of the legacies. In *Scholes & Lefroy, 10, Pearson vs. Pearson*, Lord Redesdale said he remembered a case where the controversy had continued nearly forty years, and yet the legatees when paid received interest from one year after the testator's death."

"We have no difficulty in deciding the claims of the complainants, and of those circumstanced as they are under the will, are well founded, and we will sign a decree in accordance with these views. The rate of interest to be allowed will be six per centum."

It is appropriate, in connection with what the General Term of the Supreme Court of the District of Colum-

bia said in the foregoing opinion concerning the preference to be exercised in favor of general legacies as against a residuary legatee, to quote a rule approved in *Barber vs. Pittsburgh, Fort Wayne & Chicago Railway Company*, 166 U. S. 83, 100, 41 L. Ed. 925:

“The first taker is always the favorite object of testator’s bounty, and as such is entitled to the benefit of every implication.”

In 1915 the question of the right of a legatee to interest came before Mr. Justice Gould in *Reed vs. Dodge*, 43 W. L. R. 546. In the opinion prepared by Mr. Justice Gould it is said:

“It is an almost universal rule that general legacies bear interest only after the expiration of one year from the death of the testator, in the absence of language expressing a contrary intention in the will. In this jurisdiction the question is settled by the case of *Powell, et al. vs. Drake, et al.*, 19 D. C. at page 339, 19 W. L. R. 136. In this case the court quoted with approval from *Budd vs. Garrison*, 45 Md. 430, as follows:

‘There can be no doubt that a pecuniary legacy bears interest from the time at which it is by the terms of the will made payable, and if no time of payment is fixed by the will it is payable within the time limited by law, and bears interest from that date, that is, from the expiration of one year after the testator’s death. To this general rule there is the exception that where the testator stands to the legatee in *loco parentis*, and the latter is otherwise unprovided for, then, whether a future time is fixed for the payment or not interest will be allowed from the testator’s death.’

“The rule is very clearly stated in the case of *Welch vs. Brown*, 43 N. J. Law, 37, where the court said:

‘In the determining as of the time legacies shall take effect and be payable, certain general rules have been adopted; and testators in making their wills are considered as framing their testamentary dispositions in view of those general rules. * * * With respect to general legacies, the law, for convenience, has prescribed as a general rule that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and specified out of the testator’s estate at the expiration of one year next after his death. (Cases cited) On a legacy coming within the claims of general legacies, if the legacy be not paid at the expiration of one year, interest from that time will be allowed as damages; and interest on a legacy will not be paid from a period prior to that time unless there be a clear expression of intention that interest shall be allowed. In that case, the interest is regarded as of the substance of the gift, and is not recoverable as such unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.’ ”

These Item Eighteen legacies are not contingent. The testator is not presumed to have done a vain thing when he included Item Eighteen in his will, or to have supposed that the gifts in this paragraph were mere words. These gifts were no more contingent than any other gift in any other will. Debts must always be paid before gifts are enforceable. This fact does not make the gifts contingent. Neither does the declaring of preferences between beneficiaries create a contingency.

The following language quoted from *Matter of Frankenheimer*, 195 N. Y. 346, 353, 88 N. E. 374, is peculiarly pertinent to the facts of the instant case:

“It is contended in this case that these legacies are unliquidated and consequently would not draw interest. We think this contention cannot be upheld. The testator has specifically mentioned the amount that he intended to give each of the general legatees. The claim of each was, therefore, known and liquidated as fully and completely as if it had been fixed by a judgment or a promissory note. The only question open was as to whether the estate had property from which the legacies could be paid in full. In this case the assets available for the payment of these legacies were not sufficient to pay in full. They would only pay eighty-six per cent thereof and consequently the situation presented is analogous to that of the distribution of the assets of an insolvent estate among its creditors. We think therefore that the general legatees had the right to have interest allowed, provided there were funds available out of which interest could be paid.”

Another quotation from the Court of Appeals of New York which is in point is found in *In re Rutherford*, 196 N. Y. 311, 89 N. E. 820:

“The testatrix by the will now under consideration does not expressly postpone the payment of any or all of the legacies given by her, and we do not find any clear or other indication in the will of an intention to postpone the payment of such legacies, or to deprive the legatees of interest from one year after letters testamentary were issued in case the same were not then fully paid. In cases where interest has been refused upon a legacy, although not paid within one year after letters tes-

tamentary had been issued, it has been held that it was clear from the will that such legacy should not become payable until a later date. (Cases cited). Where such postponement has not been found to be entirely clear, interest has not been denied upon legacies not paid within the time provided by the statute."

In *In re Bielby's Estate*, 155 N. Y. Supp. 133, 143, it is announced "that the rights of a legatee as to interest follow the legacy as matter of law and are not effected by the fact as to whether the assets of the estate have been fruitful or unproductive."

In *Bonham vs. Bonham*, 38 N. J. Eq. 419, the court said:

"The fact that it was necessary in order to carry out the testator's intention in regard to the support of his wife to postpone the payment of the general legacies until after her death in no wise affects the character of the legacies. It did not make them contingent legacies."

The fact that the Item Eighteen legacies were to be scaled down in the event there was not sufficient estate to pay them in full would not deprive these legatees of interest upon the amount due them after the scaling down had taken place, for in the *Bonham* case the New Jersey court continues:

"In view of the deficiency of assets to pay interest in full on all, there must be a ratable payment of interest to all."

The case of *In re Short's Estate*, 99 Atl. 609, presents a will in which the testator indicated a five year period during which the executor might delay payment

of legacies, although fixing discretion and power in the executor to dispose of the property which would provide the fund for the payment of legacies at any time. Concerning the payment of interest on legacies the court said:

“An examination of the adjudicated cases will, I think, fully disclose that the general rule for interest to commence to run on a general legacy at the end of a year after the decease of a testator has been recognized and enforced in all cases in which it is not made clear by the provisions of the will that testator intended to the contrary, and a contrary intention will not be inferred either from provisions of a will giving the executors a longer period of time in which to make settlement of the estate or from provisions making a legacy payable out of securities which the executors are not required to call in within the year or even out of securities which cannot be called in within the year. * * * It must be held that the provisions of the will here in question cannot be said to indicate an intention upon the part of testator to deny interest on the legacies after the expiration of one year from his decease with that degree of clearness and certainty which is necessary to overthrow the general rule.”

The following language taken from the opinion in *O'Leary's Estate*, 255 Pa. 521, 523, is applied to an estate in many respects similar to the present estate:

“The pecuniary specific legatees claim interest beginning one year after the death of the testator. This is resisted by the residuary legatees on the ground that these legacies could be paid only by sales of the property and that the discretion vested in the trustees as to sales thereof, coupled with the fact that no sales could be made to ad-

vantage, indicate an intent on the part of the testator to give these legatees the amounts bequeathed only after funds were secured for the purpose of meeting the same.

“The second paragraph of the will heretofore referred to clearly places the entire estate, real, personal and mixed, in the hands of the trustees with directions to convert the same from time to time at such prices and at such terms as they may think proper and thus provide the funds from which the bequests shall be paid. * * * It will be observed that legacies were payable out of personal as well as real estate and that holding the personalty was to the advantage of the estate. Why should the residuary legatees have the benefit of this increase as against the preferred pecuniary legatees? The discretion as to time of conversion does not control as to time of payment. If payment is postponed, it does not follow that interest is lost.”

It is said in *Davison vs. Rake*, 44 N. J. Eq., 506:

“The principle is settled, that even where the testator has, by the disposition he has made of his property, put his estate in such condition that his general legacies cannot be paid for many years after his death, interest will, nevertheless, begin to run on them at the end of a year from his death.”

A leading English case is *Wood vs. Penoyre*, 13 Vesey, Jr., 326, in which case the Master of Rolls said:

“My first impression upon this case certainly was, that the words ‘when the same shall be recovered,’ had the effect of postponing the time of payment, and consequently the right to interest, until the mortgage debt, out of which the legatees were payable, should have been actually received

and got in. But upon farther consideration of the cases, applicable to this subject, I am satisfied, these words mean, and therefore ought to receive, a different construction.

“Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid, until the money due upon such securities is actually got in; but by a rule, that has been adopted for the sake of convenience, this court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be impracticable within that time; yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment.”

V.

These legatees now stand in the shoes of creditors and partial payments apply first to interest.

Whether the assets of the estate have been fruitful or unproductive does not affect the right of the legatee. He is in the position of a creditor and entitled to be awarded interest at the legal rate for such time as he is kept out of his demand.

In re Bielby's Estate, 155 N. Y. Supp. 133, 143.

In re Rutherford, 196 N. Y. 311, 89 N. E. 820, 821.

In re Brandon's Estate, 164 Wis. 387, 391, 160 N. W. 179.

Partial payments by the executor to these legatees are to be applied first to the discharge of interest and only the surplus of these payments exceeding the in-

terest due goes toward discharging the principal. This is the rule announced in *Story vs. Livingston*, 13 Peters 359, 371, 10 L. Ed. 200, 206, in these words:

“The correct rule in general is that the creditor shall calculate interest whenever a payment is made. To this interest the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the principal so as to produce interest. This rule is equally applicable, whether the debt be one which expressly draws interest, or on which interest is given in the name of damages.”

Chancellor Kent in *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 17, 7 Am. D. 471, announces the rule as follows:

“The rule for casting interest, where partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payment be less than the interest, the surplus of the interest must not be taken to augment the principal; but interest continues on the former principal; until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal; and interest is to be computed on the balance, as aforesaid.”

CONCLUSION

The issue of law herein requires the court to determine whether on the one hand to announce an inter-

pretation of Item Eighteen of the will of Charles E. Wood arrived at by speculation and conjecture concerning what the testator would prefer if he were here now to express his wishes, or on the other hand whether to this will shall be applied those principles and landmarks of the law laid down for the security and preservation of written wills.

It is equally indefensible, whether done deliberately or unconsciously, to undermine the rule requiring a will to be in writing.

We must constantly guard against the substitution of speculation and conjecture for the written words chosen by the testator.

It cannot be controverted that the Item Eighteen legacies are pecuniary legacies and as such within the rule that interest attaches thereto "as an accretion."

It cannot be controverted that Item Eighteen is not united grammatically with any other item of the will.

It cannot be controverted that Item Eighteen did not become enforceable until all prior gifts had been satisfied and eliminated.

Item Eighteen is not confused or connected with any other item either by the design of, or a common purpose expressed by, the testator.

It was only by speculating concerning what may have been the intent of the testator, based upon supposed implications drawn from other paragraphs of the will, that the lower court concluded that testator did not intend the Item Eighteen legacies to have interest.

Gifts in one paragraph in a will are not to be cut down by construction depending upon other and distinct paragraphs of the will.

No reason existed for the delay in making payment of the Item Eighteen legacies except the lack of assets

sooner available. The executor is not to be criticized for conserving the assets, acting under the broad discretionary powers reposed in the executor by the testator. Neither are these legatees to be deprived of the full value of their legacies because of the length of time these legacies have been withheld. The facts of this case exhibit precisely the reason for the rule which entitles pecuniary legacies to interest.

Respectfully submitted,

ROGER J. WHITEFORD,

JOHN J. HAMILTON,

HENRY C. CLARK,

*Attorneys and Counsel for
Aforesaid Legatees.*

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1926

No. 4535

JAMES R. CATON, ROBERT BRUCE EMERSON, AND
WILLIAM H. EMERSON, ADMINISTRATORS OF
THE ESTATE OF W. R. EMERSON, DECEASED;
CORA HAMILTON KNOX, EXECUTRIX OF THE
ESTATE OF W. S. KNOX, DECEASED, ET AL., AP-
PELLANTS.

VS.

AMERICAN SECURITY AND TRUST COMPANY, EX-
ECUTOR AND TRUSTEE, ET AL.

BRIEF FOR APPELLANT J. BARRETT
CARTER, TRUSTEE OF FRANK K. RAY-
MOND, BANKRUPT.

STATEMENT OF FACTS

This is an appeal from the action of the Su-
preme Court of the District of Columbia in holding
that interest was not payable on certain legacies

set forth in Paragraph 18 of the will of Charles E. Wood, deceased. There are several appellants. As to appellant J. Barrett Carter, Trustee of Frank K. Raymond, Bankrupt, the appeal involves, in addition to the question of interest, the right of the executor of the Wood estate to set off against a legacy in favor of Raymond a debt which he owed the estate.

In Paragraph 18 of his will, Charles E. Wood bequeathed to Frank K. Raymond the sum of \$5,000.00 (R. 6). There were many other legacies in various amounts provided in this paragraph. Nothing was said with reference to the payment of interest. In Paragraphs 8, 9, 10, 11 and 13 of the will, certain legacies were provided which had preference as to the order of payment over the legacies in Paragraph 18, and which the testator, after making certain provisions for his wife, directed to be paid as soon as possible, with interest at five per cent. He also directed that the devises and bequests to his wife should have preference in payment both as to principal and interest.

The testator died in February, 1908, but the estate did not have sufficient liquid assets to pay the legacies set forth in Paragraph 18 until the year 1926. The question of interest on these legacies arose, and the executor petitioned the court for instructions (R. 11). In this petition the executor set forth that Raymond was indebted to the estate in the sum of \$1,532.92, represented by a note

dated December 23, 1908, payable to the executor two years after date, with interest at six per cent; also that on May 3, 1909, Raymond and his wife assigned to the executor so much of his \$5,000.00 legacy as might be necessary to pay the note, with interest (R. 16-17). J. Barrett Carter, as trustee of Raymond's bankrupt estate, by leave of court, filed an answer to the executor's petition for instructions, in which he claimed interest on the legacy and also denied the right of the executor to withhold the amount of the note and interest as a set-off. His answer also set forth the fact that Raymond was adjudicated a bankrupt on December 31, 1908, and that the assignment of the legacy by Raymond, dated May 3, 1909, was made while Raymond was a bankrupt and before his discharge as such and was accordingly null and void (R. 32-34).

The court below decreed that interest was not payable on the legacies mentioned in Paragraph 18 (R. 51), but did not pass on the question raised in the answer of Raymond's trustee as to the right of the executor to set off Raymond's debt against his legacy.

ASSIGNMENT OF ERRORS

1. In holding that the legatees in item eighteen of the will of Charles E. Wood, deceased, are not entitled to interest on their respective legacies.

2. In failing to hold that the alleged assignment by Frank K. Raymond and wife to the petitioner,

dated May 3, 1909, as set forth in the petition, was null and void and of no force and effect.

3. In failing to hold that the alleged promissory note referred to in said petition, executed by Frank K. Raymond to petitioner on December 23, 1908, was not a proper set-off against the legacy to the said Frank K. Raymond.

4. In failing to hold that petitioner was not entitled to collect interest on said note.

ARGUMENT

I

Legatees Under Paragraph 18 Are Entitled to Interest

Inasmuch as there are a number of appellants interested to a greater extent than the Raymond estate in the payment of interest on the legacies involved in Paragraph 18, and the question will undoubtedly be fully discussed in the several briefs, we will not in this brief present the matter at great length.

The law is apparently well settled in the District of Columbia that as a general proposition interest is payable on deferred legacies unless the intention of the testator appears to the contrary (*Reid v. Dodge*, 43 W. L. R. 546, Supt. Ct. D. C.; *Powell v. Drake* 19 D. C. 339). The decision of the court below, however, was based on a

construction of the will itself, the court holding that the testator had not intended that interest be paid on these particular legacies (R. 59). It is our contention that the court, in order to reach such a conclusion, was obliged to conjecture beyond the plain and unambiguous language of the will. If there were words or expressions of doubtful meaning in the will, then it would be proper to seek the intention of the testator, but in the absence of such uncertainty the will must speak for itself and be construed in accordance with the sound legal principles which have been laid down by the courts for that purpose.

The court below analyzed the will in detail and placed its own construction on what the testator must have had in mind in the general scheme of his will. That such was beyond the province of a probate court is clear. Neither the will itself nor any paragraph thereof was under attack and a probate court not being a court of construction (*Vestry v. Bostwick*, 8 App. D. C. 452), should only have determined the legal effect of the provisions of the will itself for the purpose of ordering a proper distribution of the estate.

In the first place the will contains a clear provision as to the payment of interest at five per cent on certain preferred legacies. It contains another clear provision in Paragraph 18 as to certain general legacies without mentioning the question of interest. Standing alone, Paragraph 18 would carry with it as a matter of law the pay-

ment of interest at six per cent from one year after the testator's death (*Reid v. Dodge, supra*). It now remains to be seen whether the legal effect of one clear and independent provision in a will may be changed inferentially by another independent and unrelated clause. In the case of *Travers v. Reinhardt*, 205 U. S. 423, where it was sought by interpretation of one clause to have the word "and" substituted for the word "or" in another clause, the contention being based on what was claimed to be the dominant purpose of the testator in the will, the court held that there was no reason for interpreting the words otherwise than according to their ordinary natural meaning.

The court said:

"The court would not be justified in making the proposed substitution unless the whole context of the will plainly and beyond question requires that to be done in order to give effect to the will of the testator * * *. We concur with the Court of Appeals, speaking by Chief Justice Shepard, in holding that the words in question are unambiguous and their obvious ordinary meaning must not be defeated by conjecture."

It is well established that the intention of the testator expressed in his will shall prevail provided it be consistent with the rules of law (*Home v. French*, 187 U. S. 401); also that in construing a will the meaning of the testator must be looked for in the provisions of the will itself

(*McAleer v. Schneider*, 2 App. D. C. 461; *Atkins v. Best*, 27 App. D. C. 148).

There is no ambiguity in the will of Charles E. Wood. The legacies in Paragraph 18 can only be limited in their legal effect by the inference or conjecture that the testator intended so to limit them in an entirely independent provision of the will.

In the case of *Montgomery v. Brown*, 25 App. D. C. 490, a testator made a provision for his wife and in a later clause made an inconsistent provision in favor of his brother. The brother sought an interpretation whereby the wording of the clause in his favor would control the previous clause in favor of the wife. The court denied this contention and, on page 494, said:

“There can be no question but that, notwithstanding the terms in one clause of a will denote an absolute estate, by a subsequent clause such an interest may be qualified by a limitation over in a certain event, or that it may be cut down; but as the New York Court of Appeals, in *Freeman v. Coit*, 96 N. Y. 63, in recognizing such rule, said: ‘There is another rule of construction of equal force, and not inconsistent with the one just stated, and that is that when an interest is given or an estate conveyed in one clause of an instrument, it cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or by clear and undoubted implication.’ ”

In 40 Cyc., page 1416, we find the following:

“Where two clauses are entirely independent of each other or deal with different subjects, and there is no apparent design to connect them, each clause must be considered and construed separately and without relation to the other, although the testator may have had the same intention in regard to both.”

In support of this position is cited the case of *Bailey v. Sanger* 108 Ind. 264, 9 N. E. 159. In that case, the estate of the testator's widow was sought to be reduced by inference from another clause of the will.

The court said, on page 160:

“In our opinion, the two clauses of the will above set out are entirely independent of each other. Each clause creates an estate in the several devises therein named. There is no apparent design to connect them, nor are they united grammatically, or by the expression of a common purpose. In such a case each must be considered and construed separately, and without relation to the other, even though it may be conjectured that the testator had the same intention in regard to both.”

Also in the case of *United States Fidelity, etc., Co. v. Douglas*, 134 Ky. 374, 120 S. W. 328, it was held that the language used in making a specific bequest cannot have a controlling influence in interpreting the language used in dealing with different subjects.

In the case of *Ward v. Amory*, 29 Fed. Cases 162, the court, in considering inconsistent provisions of a will as to the disposition of property, said:

“It is unsafe to set aside the express terms employed by the testatrix in the very clause in which the bequest is made because it is found not easily reconciled, or perhaps not completely reconcilable, with language employed in other parts of the instrument.”

It may be presumed that the testator Charles E. Wood had knowledge of the reasonable meaning of the words he used and of the legal effect of the legacies provided in his will. There is nothing in the will to negative the presumption that he knew the legacies in Paragraph 18, in the absence of a restriction by him, would bear interest at six per cent. With this in mind it seems extremely unreasonable to argue that, because in another clause he limited other legacies to interest below the legal rate, he intended so to limit legatees in an entirely separate class. If we give him credit for knowing what would happen if he failed to restrict the payment of interest under Paragraph 18, we should give him credit for intelligence enough to do so in specific language had he so intended. It would have been a simple matter to say either that he did not intend these legatees to have interest or that if he did so intend he wanted them to have only five per cent. The court below refers to the singular result of the legatees in Paragraph 18 receiv-

ing six per cent whereas preferred legatees in previous paragraphs would receive but five per cent (R. 58). As a matter of practical logic, however, we beg to call the court's attention to the fact that at the time the will was made it was extremely problematical whether the legatees in Paragraph 18 would get anything at all. The testator desired the preferred legatees paid as soon as possible with five per cent interest, but having placed the legatees in Paragraph 18 in a more distant and uncertain position, it is not unnatural to suppose that he was willing, if they ever got their legacies at all, for the law to take its course as to the payment of interest. In fact, it seems more reasonable that if the testator thought about the matter at all he would have been willing that they have the interest which the law allows, as some compensation for the uncertainty and delay to which they were subjected, even though such interest exceeded the rate allowed the preferred legatees.

In an elaborate note following the case of *Hamilton v. Sidwell*, 29 L. R. A. (N. S.) 961, 1045, the rule of construction is set forth that if the words in a will have a *legal effect*, the intention of the testator can not be shown to the contrary. This note applies particularly to the construction of wills or deeds involving the rule in Shelley's Case. The note points out that in jurisdictions where the rule is in force it would prevail in determining the estate left by the ancestor, no matter what his in-

tention might have been, if the wording of the will or deed brought it within the rule.

In the present case if the will carries certain legal rights to the beneficiaries named therein, it is immaterial what the intention of the testator was. If the will itself, construed without conjecture as to the meaning of certain provisions in another paragraph, gives the legatees in Paragraph 18 the right to interest, then a contrary intention may not be shown by inference or by extrinsic evidence (*Atkins v. Best, supra*).

In the case of *Taylor v. Stephens*, 165 Ind. 200, 74 N. E. 980, the court said:

“As has been often announced, the intention of the testator is to prevail where it does not conflict with the law, but the fact is not to be forgotten that, in the disposition of the nebula of will cases, the courts have evolved rules of construction which can scarcely be said to be subsidiary to the intention of the testator, since it must be presumed, in the absence of language in the will repelling the inference, that he acted in the light of the settled meaning which the law attached to his words. *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657.”

In the *Appeal of Koons, et al. (Pa.)*, 6 Atl. 377, 113 Pa. 621, an old and well considered decision by the Supreme Court of Pennsylvania, it appeared from the facts as stated by the court, as follows:

“A., by deed of trust, transferred, on June 24, 1853, a part of his estate to trustees, to pay him the income for life, and at his death to pay certain annuities, and the trust estate to continue until the death of the last annuitant. A. died May 26, 1858. By his will he devised an annuity to his wife, a legacy to a third person, and then \$10,000 to a charity; further directing that the balance of his estate, after securing the annuity to his wife, should be applied to the payments of the legacies in order of priority mentioned, and finally bequeathed the residue of his estate, including ‘any balance * * * resulting from the closing of’ the above trust deed, to his executors, in trust, to carry out the purposes of his will, and divide the remainder among his children. The last annuitant under the above trust deed, died in 1884. Upon a distribution of the balance of testator’s estate, *held*, that interest on the above legacy of \$10,000 should be paid from one year after the testator’s death until the time of payment.”

In the course of the opinion, the court said:

“The legacy of \$10,000 to the appellee was absolute, without any condition as to its payment, and no time of payment was expressed in the will which gave it. Literally the case, as to the question of interest, comes directly within the words of the act of February 24, 1834, par. 51, which provides that ‘legacies, if no time be limited for the payment thereof, shall in all cases be deemed to be due and payable at the expiration of one year from the

death of the testator.' This legislation supplies a testamentary intent, and hence, where it is claimed that a money legacy shall not bear interest from the expiration of one year after the testator's death, the contention must be supported by clear evidence of an intent contrary to the act to be found in the will of the testator. This doctrine was long ago asserted, and has ever since been followed, by this court. Thus, in the case of *Huston's Appeal*, 9 Watts 472, we said:

“ ‘The general rule of giving interest to the legatee from the expiration of the year is not to be extended or controverted upon slight inferences of intention; nor will it yield to the impossibility of getting in the estate so as to pay the legacy within the year allowed for that purpose. And even though the legacy is to come out of a part of the testator's estate which cannot be recovered for a long time after the year, and the testator directs the legacy to be paid when the money which is to constitute it can be recovered, still the payment of interest, if practicable, or at least the computation of it, will commence from the the end of the year after the testator's decrease;’ citing *Wood v. Penoyre*, 13 Ves. 326.”

While here we are not dealing with a statutory rule, we have at least clear court decisions in favor of the allowance of interest where not restricted in the will; and this legal position in which the legatees in Paragraph 18 find themselves should not be altered except by a clear and unequivocal expression of the testator's intention.

II

The Assignment of May 3, 1919, Was Null and Void

This proposition would seem to be too obvious to require argument. The testator died in February, 1908; Raymond was adjudicated a bankrupt December 31, 1908; the assignment was dated May 3, 1909, before Raymond's discharge as a bankrupt. Under the bankruptcy law, the property of a bankrupt vests in his trustee for the benefit of his creditors. Raymond had, therefore, no assignable interest in the legacy on May 3, 1909, and the alleged assignment was consequently void and of no effect whatever. Inasmuch as we are informed that counsel for the executor will not urge the validity of this assignment, we will not discuss it further.

III

The Alleged Indebtedness of Raymond Was Not a Proper Set-Off Against His Legacy

This question was raised by the pleadings but was not passed on by the court below. It was a matter which the probate court should properly have settled, inasmuch as it involved only a question of distribution to a legatee, and no real contest over the assignment.

The general proposition that a legatee's debt to an estate should under ordinary circumstances be

set off against his legacy is not disputed, and if the executor here had gone no further than that, there would doubtless have been no cause for complaint. However, not only the debt itself, which amounted to \$1,532.92, was charged against the legacy, but an additional sum of \$1,636.39 for interest which had accrued since the creation of the debt about nineteen years ago. The debt was represented by a note dated December 23, 1908 (some months after the testator's death) payable in two years, with interest at six per cent. One week after the note was executed, Raymond was adjudicated an involuntary bankrupt pursuant to petition filed May 28, 1908. The claim was never proven by the executor against the bankrupt estate.

It may be doubted that Raymond's debt to the estate was a proper set-off at all, particularly at this late date. The executor took a two-year note for the amount due the estate by Raymond. If, within the two years, it had been possible to pay the legacy, the executor would have been obliged to do so without setting off the debt. (*Hayes v. Hayes*, 2 Del. Ch. 191; 11 R. C. L. 245.) Raymond having become a bankrupt one week after the note was executed, pursuant to a petition filed several months before, it was the legal duty of the executor to prove the debt against the bankrupt estate within the year prescribed by law.

Section 68-b of the *Bankruptcy Law* (30 Stat. 565) provides:

“A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act in bankruptcy.”

The Wood estate was just as much a debtor to Raymond as Raymond was to the executor by virtue of the note. (*Holt v. Libby*, 80 Me. 329, 14 Atl. 201.) Raymond's indebtedness is solely by virtue of the note of December 23, 1908. The executor took this note seven months after the bankruptcy petition was filed and one week before the adjudication of Raymond as a bankrupt. The executor, instead of proving its debt against Raymond's bankrupt estate, although created during the latter's insolvency, has sought not only to use it as a set-off against an indebtedness of the Wood Estate to Raymond but has also set off about eighteen years' interest.

In 3 R. C. L. 254, we find the following statement:

“It is the main purpose of clause (2), above quoted, as its terms show, to prevent debtors of the bankrupt from acquiring claims against him for use by way of set-off and reduction of their indebtedness to the estate. A set-off can not be allowed in favor of one who, within the prohibited period, and with

knowledge of the insolvency of the bankrupt, acquired claims against him, with a view to using the same by way of payment or set-off, so as to obtain an advantage over other creditors.”

In support of this statement are cited the cases of *Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co.*, 229 U. S. 435, and *Western Tie & Timber Co. v. Brown*, 196 U. S. 502.

In the latter case the bankrupt was indebted to a corporation whose laborers purchased supplies from him, and who at intervals paid him by deductions from the laborers' wages. Within four months of the filing of the bankruptcy petition the corporation deducted about \$2,000.00 from the laborers' wages, but did not remit to the bankrupt. On filing its claim, the corporation retained as a set-off the amounts so deducted. In denying the right to such set-off, the Supreme Court said:

“It follows that as to such deductions the tie company stood towards Harrison in the relation of a trustee, and, therefore, the case was not one of mutual credits and debts within the meaning of the set-off clause of the bankrupt law. *Libby v. Hopkins*, 104 U. S. 303. And, irrespective of the trust relation which the findings establish, *it is equally clear from general considerations that the right to set-off did not exist.* To allow the set-off under the circumstances disclosed would violate the plain intendment of the inhibition

contained in clause b (2) of Section 68 of the bankrupt act, which forbids the allowance to any debtor of a bankrupt of a set-off or counter-claim which 'was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt is insolvent or had committed an act of bankruptcy.' That is to say, whether or not the trust relation was engendered, the result would still be that the tie company, within the prohibited period and with knowledge of the insolvency of Harrison, acquired the claims of the latter against the laborers, with a view to using the same by way of payment or set-off, so as to obtain an advantage over the other creditors, which it was not lawfully entitled to do.

* * * * *

"It follows that although the judgment below must be reversed for the reasons stated, the case should be remanded with directions to disregard the alleged claim of set-off, to reject any proof of claim asserting the same, and to permit a claim to be filed for the gross indebtedness to the tie company, with the alleged set-off eliminated. The result will be that the tie company will be a creditor of the estate for the whole amount of its claim, and will be at the same time a debtor to the estate for the amount of the deductions from the pay-rolls collected by it, the court below, of course, having power to take such steps as may be lawful to protect the estate in respect to the payment of dividends to the tie company, in the event that company does not dis-

charge its obligations to the bankrupt estate." (Italics supplied.)

Except for the right of retainer which existed in the Wood Estate, it stood in the same position as any other creditor of the bankrupt, and before the note which it seeks to retain as a set-off came into existence Raymond was insolvent, a bankruptcy petition was pending, and the rights of his creditors had intervened. Under the decision last quoted, therefore, the executor should have filed a claim in behalf of the Wood estate along with Raymond's other creditors. Having failed to do so, it cannot now exercise the right of retainer to the prejudice of these creditors.

In the case of *In re Shults*, 135 Fed. 623, it is held as follows:

"If this particular fact is drawn in issue, the burden is on the party claiming the right of set-off to show that he had no notice or knowledge of the insolvency of the party with whom he was dealing, and consequently no intention of using the claim in question as a set-off in the latter's bankruptcy."

IV

Executor Not Entitled to Interest on Raymond's Indebtedness After One Year From Testator's Death.

It appears to be well settled that where the will contains no direction for the deduction of

debts, the executor, in deducting debts due from a legatee to the testator, may charge interest on the legatee's indebtedness until such time as the legacy becomes payable. 40 Cyc. 1892; *Leask v. Hoagland*, 136 N. Y. App. Div. 658; *Bowen v. Evans*, 70 Ia. 368, 30 N. W. 638.

In the latter case, it was held as follows:

“A general legacy does not operate immediately upon the death of the decedent as a payment of the legatee's debt to the estate; but such debt will continue to bear interest until such time as the legacy becomes properly payable under the laws governing the settlement of estates.”

The courts of some states have taken the view that the debtor heirs inherit less by reason of their indebtedness and that consequently no interest should be charged thereon after the testator's death. In the case of *Tobias v. Richardson*, decided in 26 Ohio C. C. 81, affirmed without opinion in 72 Ohio State 626, the heirs were indebted to the decedent at the time of his death. There was no personal estate for distribution. It was held that such debts as were due the decedent became advancements, and upon his death a quantum of interest in the land taken by inheritance became fixed, and the debts as such ceased to exist. By reason of the heirs inheriting less than they would be otherwise entitled to, the debts were paid.

The New York courts have followed the doctrine that where a legatee owes a debt to the testator it

is an asset of the estate in the hands of the legatee, and is a satisfaction of the legacy to the extent thereof. *In Re Foster*, 77 N. Y. Supp. 922; *Clark v. Bogardus*, 12 Wood 69; in *Re Colwell's Estate*, 15 N. Y. State Rep. 742.

In the case of *Dickerson v. Stokes*, 4 Dem. Sur. (N. Y.) 219, it was held that where a legatee owes the testator less than the amount of the legacy, the deduction should be made for the purpose of computing interest as of the date of the testator's death.

Apparently, none of the courts go further than to allow interest on the legatee's debt *after the legacy becomes payable*. It remains therefore to determine when the legacy becomes payable. The question has been settled in this jurisdiction by the case of *Reid v. Dodge* (Sup. Ct. D. C.) 43 W. L. R. 546, where the court said:

"It is an almost universal rule that general legacies bear interest only after the expiration of one year from the death of the testator, in the absence of language expressing a contrary intention in the will. In this jurisdiction the question is settled by the case of *Powell, et al. v. Drake, et al.*, 19 D. C., at page 339, 19 Wash. Law Rep., 146. In this case the court quoted with approval from *Budd v. Garrison*, 45 Md. 430, as follows:

"There can be no doubt that a pecuniary legacy bears interest from the time at which it is by the terms of the will made payable,

and if no time of payment is fixed by the will it is payable within the time limited by law, and bears interest from that date, that is, from the expiration of one year after the testator's death. To this general rule there is the exception that where the testator stands to the legatee in loco parentis, and the latter is otherwise unprovided for, then, whether a future time is fixed for the payment or not, interest will be allowed from the testator's death.'

“The rule is very clearly stated in the case of *Welch v. Brown*, 43 N. J. Law, 37, where the court said:

“ ‘In determining as of the time legacies shall take effect and be payable, certain general rules have been adopted; and testators in making their wills are considered as framing their testamentary dispositions in view of those general rules * * * with respect to general legacies, the law, for convenience, has prescribed as a general rule that where no time is named by the testator, and in the absence of any intention derived from the will itself, such general legacies shall be raised and specified out of the testator's estate at the expiration of one year next after his death. (Cases cited.) On a legacy coming within the class of general legacies, if the legacy be not paid at the expiration of one year, interest from that time will be allowed as damages; and interest on a legacy will not be paid from a period prior to that time, unless there be a clear expression of intention that interest shall be allowed. In that case, the interest

is regarded as of the substance of the gift, and is not recoverable as such unless there be a clear intention apparent on the face of the will that interest shall be payable from a period prior to the expiration of the year.' ” (Italics supplied.)

In the present case the legacy was a general one, payable as soon as possible after certain preferred bequests were taken care of. Its legal status, so far as its due date was concerned, should not be disturbed by the fact that there was no money to pay it. (*Appeal of Koons, supra.*) If it were not payable a year after the testator's death, there would certainly not exist the universal practice of allowing interest from this date. Raymond's debt to the estate, if a proper set-off at all, should have borne interest only to the date the legacy was payable, and the set-off should have taken place in effect at that time, reducing the legacy to that extent. Interest amounting to more than the debt itself has been deducted by the executor with the manifestly inequitable result that out of a legacy of \$5,000.00, Raymond's estate receives only \$1,830.69, a deduction of \$3,169.31, although his original debt to the Wood estate was only \$1,532.92; and this is true in spite of the fact that the executor has for many years had the possession and use of the assets from which the legacy is payable. If the set-off was proper at all, which we earnestly contend it was not, it should have occurred in fairness to all parties, one year after the testator's death, with proper interest deductions as

of that time. This should have left about \$3,400 as a balance due Raymond; and if interest is allowed on the legacy it would be on this sum and not on the entire amount of the original legacy. Of two clear debts in 1908, one has more than doubled, while the other has remained at a stand-still. By simply doing nothing at all, the executor has enriched the residuary legatees to the extent of \$1,636.39, at the expense of Raymond's creditors. A set-off should clearly not be allowed which results in such obvious injustice.

Respectfully submitted,

GEORGE V. TRIPLET, JR.,
*Attorney for Appellant
J. Barrett Carter, Trustee
of Frank K. Raymond,
Bankrupt.*

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

APR 7 - 1927

Henry M. Hodges
Clerk

IN THE

Court of Appeals, District of Columbia.

APRIL TERM, 1927.

No. 4535.

JAMES R. CATON, ET AL., APPELLANTS,

vs.

**AMERICAN SECURITY AND TRUST COMPANY,
EXECUTOR AND TRUSTEE, ET AL., APPELLEES.**

**BRIEF FOR AMERICAN SECURITY AND TRUST
COMPANY, EXECUTOR AND TRUSTEE UNDER
THE WILL OF CHARLES E. WOOD, DECEASED.**

**FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,**

Attorneys for said Appellee.

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STATEMENT.

This appellee, American Security and Trust Company, as executor of and trustee under the will of Charles E. Wood, deceased, presented a petition to

the Supreme Court of the District of Columbia, holding Probate Court, praying for instructions as to whether interest should be paid on legacies bequeathed by Item 18 of the will and, if so, at what rate. Under Item 18, legacies aggregating \$201,000 were bequeathed to eighty-eight individuals, but payment of the principal of said legacies was delayed for about eighteen years under the circumstances hereinafter described (Record 11-24).

Various legatees, in answer to the petition, claimed that interest should be paid on the legacies from the expiration of one year after testator's death (R. 49-50), but the Michigan Sanitarium and Benevolent Association, claiming to be the residuary legatee, opposed the payment of any interest which would diminish the residuum (R. 38-41).

Allowance of interest was also opposed by eight of testator's next of kin, who claimed that the residuary bequest was invalid and that they were entitled to the residue. Two of the next of kin, however, William E. Harmon and Clifford B. Harmon, consented to the payment of interest on the legacies (R. 42-45).

The widow of the testator filed an answer admitting the allegations of the petition, but did not state whether she consented to or opposed the payment of interest (R. 25).

Thereupon, Mr. Justice Siddons, holding Probate Court, after hearing, filed a written opinion construing the will at some length and held that it was not the intention of the testator to have interest paid on

the legacies (R. 51-59). A decree was entered to that effect (R. 59) and the legatees under Item 18th have appealed to this Court to reverse such decree (R. 60).

Various questions as to the validity of the residuary clause of the will have been raised in a separate equity proceeding still pending in the Court below, but they are not involved in this appeal (R. 23, 55).

SYNOPSIS OF WILL.

Briefly, the will of Charles E. Wood, dated August 27, 1907, contained the following provisions:

Items 1 and 2. Burial and funeral expenses (R. 1).

Item 3. Executor given power to sell all or any part of real or personal estate "as to it may seem best" and

"to convert all securities held by me at the date of my death, of a questionable or doubtful character, into money, and to re-invest the same in such manner as it may deem secure and to the best interest of the estate; provided however, that my said executor shall not sell or dispose of my stock in the Greater New York Development Company or the Brooklyn Development Company, or stock in any New York Company which I may own, until such time as an adequate price, as near as may be the par value thereof, can be obtained, it being my belief that this stock will, in the near future, be a valuable asset of my estate" (R. 2).

Item 4. \$10,000 to be paid to widow "as soon as possible after my decease" (R. 2).

Item 5. \$25,000 to be paid to widow as soon as executor "may be able to realize upon the assets of my estate without serious loss thereto" (R. 2.).

Item 6. \$200,000 to executor as trustee to pay income to widow during her life and upon her death the principal sum "to revert to my estate" (R. 2-3).

Item 7. Residence in Washington devised to widow (R. 3).

Item 8. "After payment in full of the legacies to my wife," \$10,000 to sister-in-law (R. 3).

Item 9. \$70,000 to nieces and \$20,000 to grandnieces (R. 3).

Item 10. \$6,000 to grandnephews (R. 4).

Item 11. \$400 to Knights Templar (R. 4).

Item 12. Explains that nephews, Clifford B. and William E. Harmon, have an abundance of this world's goods and explains failure to leave any property to wife's relatives (R. 5).

Item 13. \$10,000 to a friend and \$2,000 to a namesake (R. 5).

Item 14. "Should it be impossible for my executor hereinafter named to pay the legacies hereinbefore mentioned within the time given by law for the settlement of my estate, then it is directed to pay them as soon as it is possible for it to do so, together with interest on the said legacies at the rate of five per centum from the expiration of the legal period within which my said executor is required to make settlement,

until paid. It being my desire under all circumstances, however, that the devises and bequests made to and for the use and benefit of my beloved wife, Eurnie I. Wood, shall have preference in payment both as to principal and interest" (R. 5).

Item 15. "Should the rest and residue of my estate after the payment in full of my debts and funeral expenses and the devises and bequests made to and for the use and benefit of my beloved wife, Eurnie I. Wood, prove insufficient to pay all the other legacies hereinbefore mentioned in full, then I direct that the said legacies be scaled down sufficiently to give to each legatee a proportionate share of whatever amount there may be left for such purpose" (R. 6).

Item 16. Devise of real estate in Ohio to trustee for benefit of testator's wife (R. 6).

Item 17. \$10,000 for family monument (R. 6).

(Items 8, 9, 10, 11, 13 and 17 specify that bequests therein mentioned are to be paid "out of rest and residue of my estate.")

Item 18. "I give and bequeath out of the rest and residue of my estate, over and above the legacies hereinbefore mentioned and the trusts hereinbefore created, the following sums of money to the personal friends, and old and faithful employees of the firm of Wood, Harmon and Company, as follows:

(Omitting names of 88 individuals and amounts ranging from \$1,000 to \$5,000 aggregating \$201,000.)

And should the rest and residue of my estate prove insufficient to pay all the legacies mentioned in this item of my will in full, then I direct that the said legacies shall be scaled down sufficiently to give to each legatee under this item of my will a proportionate share of whatever amount there may be left of my estate for such purposes" (R. 6-8).

Item 19. "I give and bequeath to my trustee hereinafter named, the rest and residue of my estate after the payment in full of all legacies hereinbefore provided for, and the satisfaction of all trusts hereinbefore created, In Trust for the use and benefit of the J. G. Kellogg Sanitarium, of Battle Creek, Michigan," to erect a sanitarium near Atlantic City, N. J. (R. 8.)

Item 20. Requests executor to extend leniency in settling affairs with members of testator's firm of Wood, Harmon & Co. (R. 8).

Item 21. Appoints American Security and Trust Company executor and trustee and defines its powers (R. 9-10).

FACTS.

Charles E. Wood died on February 17, 1908, survived by his widow, Eurnie I. Wood. His will, described above, was admitted to probate on May 28, 1908, and letters testamentary issued to this appellee, which has ever since performed its duties in connection with the administration of the estate (R. 11).

If all of the property owned by testator had been sold soon after his death, or within quite a number of years thereafter, the proceeds of sale would not

have been sufficient to pay more than the debts, the legacies of \$235,000 for the use of the widow and about 50 per cent of the legacies bequeathed by Items 8, 9, 10, 11 and 13, leaving nothing for the legacies named in Items 18 and 19 (R. 14-15).

This appellee, pursuant to the directions contained in Item 3, continued to hold testator's stock in the Greater New York Development Company, Brooklyn Development Company and other New York companies, and the real estate owned by those companies has gradually increased in value. In recent years a large portion of this real estate has been sold, some of it on the instalment plan, and the Wood Estate has been receiving its proportionate share of the cash proceeds of sale (R. 15).

As the cash became available from time to time, appellee carried out the provisions of the will, paid all debts amounting to more than \$120,000, paid the legacies amounting to \$235,000 for the benefit of the widow and paid in full all legacies bequeathed by Items 8, 9, 10, 11 and 13, aggregating \$118,400, with interest thereon at 5 per cent from May 28, 1909, pursuant to instructions received from the Probate Court that such legacies and interest should be paid before payment of any amounts to the legatees named in Items 17, 18 and 19 (R. 15, 21).

When the petition was filed on February 8, 1926, this appellee, as executor, had on hand \$106,339.43 available to begin making payments on account of the principal of the eighty-eight legacies bequeathed by Item 18 (R. 15). Since the filing of the petition, appellee

has received additional funds from said Development Companies, has paid the *principal* of all of said eighty-eight legacies, except seven or eight which have been withheld for various reasons, and appellee now has on hand approximately \$100,000. During the next year or two, appellee expects to continue to receive considerable sums from the Development Companies and upon the death of testator's widow, \$200,000 will revert to the estate, so that ultimately ample funds will be available to pay interest upon the legacies bequeathed by Item 18, if this Court decides that the legatees are entitled thereto, and a substantial sum will remain for the party or parties entitled to the residuum (R. 15).

Separate Assignments of Error and Briefs of J. Barrett Carter, Trustee, and of Cora Hamilton Knox, Executrix, Attempt to Raise Questions Not Involved on This Appeal.

According to the record, the subtitle of the petition indicates that it was filed to obtain the court's instructions "as to the payment of interest on certain legacies *and as to certain alleged assignments of legatees*" (R. 11), but at the hearing below, this appellee was given leave to strike out the words italicized above, although apparently such words were not actually erased from the original petition on file in the cause.

In order to make a full disclosure of the facts, the petition contains a list of legatees who died after the death of the testator, and a list of the assignments which various legatees are alleged to have made, some

of these assignments having been made in favor of the Wood Estate to secure debts due from such legatees to the Estate.

In the prayers at the end of the petition, however, the Probate Court was not asked to pass upon the validity of these assignments (R. 24) and this appellee is advised that the Probate Court was without jurisdiction to do so.

Estate of Makinson, 54 Wash. Law Rep. 232;
Miniggio v. Hutchins, 43 App. D. C. 117.

The assignments of error and the briefs filed in this Court by Cora Hamilton Knox, executrix under the will of W. S. Knox, a deceased legatee, and by J. Barrett Carter, trustee in bankruptcy of Frank K. Raymond, also a deceased legatee, seek to inject into this proceeding certain questions as to the validity of assignments which were not in issue in the Probate Court below. Those questions may be raised, if necessary, in an appropriate proceeding in the law or equity division of the lower court.

The briefs filed on behalf of said Knox and Carter, however, also discuss the following question presented to the court for determination on this appeal.

Sole Question Involved.

As above indicated, the only prayer of the petition, besides the prayers for issuance of citation and for general relief, was for the Probate Court's "instructions as to whether petitioner shall pay interest on the legacies bequeathed by Item Eighteenth of the will

and, if so, at what rate, from what date and to what date'' (R. 24).

No other question was asked and no other question was argued in the court below. No other question is involved in this appeal.

If interest should be allowed at 5 per cent, the rate specified in Item 14, from May 28, 1909 (being one year after probate of the will), such interest would amount to almost as much as the principal of each legacy. If allowed from the same date at 6 per cent, the rate prescribed by Section 1178, D. C. Code, such interest would exceed the principal of each legacy and, in the aggregate, would exceed \$201,000, the residuum being thereby reduced accordingly.

AUTHORITIES.

General Rule as to Payment of Interest on Legacies.

There seems to be no dispute as to the general rule relating to the payment of interest on legacies. It has been stated by text writers as follows:

“Interest is recoverable, in general, from the time a general legacy becomes payable, and not sooner; which means, usually, after the expiration of the year from the testator’s death.”

Schouler, Wills, Executors and Administrators (6th Ed.), Sec. 3167.

“The general rule is that general legacies bear interest from the time they are payable or demandable.

“Where no time of payment is fixed by the will a general legacy is, in the absence of statute,

payable at the expiration of a year from the testator's death, and draws interest from that time."

18 Am. & Eng. Encyc. L. 793, citing cases.

The general rule has been adopted in this and many other jurisdictions, as indicated by the following cases:

Powell *v.* Drake, 19 D. C. 334;
 Bohrer *v.* Otterback, 21 D. C. 32;
 McLane *v.* Cropper, 5 App. D. C. 276;
 Reid *v.* Dodge, 44 App. D. C. 558;
 Budd *v.* Garrison, 45 Md. 418;
 Von Der Horst *v.* Von Der Horst, 88 Md. 130;
 Graham *v.* Whitridge, 99 Md. 248;
 Harrison *v.* Denny, 113 Md. 509;
 Moore *v.* Crockett, 90 Va. 185;
 Bartlett Estate, 163 Mass. 509;
 Gunning's Estate, 234 Pa. 148;
 Todd's Estate, 237 Pa. 466, 43 L. R. A., N. S.,
 869;
 Rutherford's Estate, 196 N. Y. 311;
 Erving's Estate, 92 N. Y. S. 1109;
 Baptist Convention *v.* Ladd, 58 Vt. 95;
 Peck's Estate, 118 A (Vt.) 527.

Exceptions to General Rule.

There are certain well-defined exceptions to the general rule, but they do not apply to the present case. Where the legacy is an annuity, or life estate, or is for the benefit of a legatee to whom testator stood *in loco parentis*, the legatee receives the income, or in

lieu thereof interest on the principal of the legacy from the date of testator's death. *Reid v. Dodge*, 44 App. D. C. 558, and many of the cases above cited, relate to these exceptions, but at the same time they reaffirm the general rule.

Qualification of General Rule.

The chief qualification of the general rule has been expressed as follows:

“Pecuniary legacies as a rule draw interest after one year from the death of the testator, *unless the will provides otherwise.*”

28 R. C. L. 353.

“Ordinarily, *in the absence of a direction in the will*, or of some special statute affecting the question, a general legacy commences to bear interest from one year after the testator's death.”

40 Cyc. 2094, citing cases.

“There can be no doubt that a pecuniary legacy bears interest from the time at which it is, by the terms of the will, made payable, and *if no time of payment is fixed by the will*, it is payable within the time limited by law, and bears interest from that date, that is from the expiration of one year after the testator's death.”

Budd v. Garrison, 45 Md. 418.

No Express Provision Forbidding Payment of Interest on Item 18 Legacies, Nor is Time of Payment Definitely Fixed.

It is self-evident that the will contains no provision expressly forbidding payment of interest on legacies under Item 18. The time of payment is certainly not fixed definitely or directly. This leads to a consideration of the provisions of the will to ascertain whether the time of payment has been fixed indirectly.

Is Time of Payment Fixed Indirectly?

In *Gunning's Estate*, 234 Pa. 148, the will provided: "When my property is sold I wish to be given to Mazie McCombs ten thousand dollars," and the court construed the will to mean that the legacy was to be paid from the proceeds of sale and that interest was to be allowed only from the time of sale.

In *Van Rensselaer v. Van Rensselaer* (113 N. Y. 207), where the will of the testator directed payment of a certain legacy out of moneys derived from the sale of a farm, the court held that the general rule allowing interest from one year after the issue of letters testamentary did not apply, as the testator had set it aside in this case by the very terms of his bequest. Interest, therefore, was allowed only from such time as the executor had sufficient funds to pay the legacy.

In *Von der Horst v. Von der Horst*, 88 Md. 127, the testator provided that each of his grandchildren should

be paid \$10,000 "as they respectively arrive at the age of majority," and it was held that such legacies did not bear interest until they became payable as each grandchild reached the age of 21.

In the present case, apparently the time of payment is not fixed, even indirectly, certainly not as definitely as in the above illustrations. Item 18 merely provides that the legacies are to be paid "out of the rest and residue of my estate, over and above the legacies hereinbefore mentioned."

Item 3 provides that the executor shall not sell the stock in the Development Companies "until such time as an adequate price, as near as may be the par value thereof, can be obtained," but this is not equivalent to fixing definitely the time when the stock is to be sold, and there is no provision to the effect that the legacies under Item 18 are to be paid out of the proceeds of sale of this stock. In Item 3 the testator expressed the belief that the stock would "in the near future, be a valuable asset of my estate." If he was attempting to fix the time for the sale of the stock, he was fixing the time as "*in the near future*" and did not contemplate a delay of eighteen years.

Effect of Delay in Settlement of Estate.

In some cases the will indicates that the testator contemplated delay in the settlement of his estate, but even in those cases interest has been allowed from the expiration of one year after testator's death.

Warwick v. Ely, 59 N. J. L. 44;

Spencer's Estate, 16 R. I. 25;

Fenton v. Hall, 235 Ill. 552.

“The mere fact that the will gives the executor several years in which to settle the estate does not alter the time from which interest on general legacies begins to run.”

18 Am. & Eng. Encyc. L., 794, citing cases.

In *Peck's Estate*, 118 A (Vt.) 527, where the executors, for a period of twelve years, withheld the payment of a legacy to themselves because the estate was in litigation, the court allowed interest on their legacy.

“When the delay is allowed only for the convenient and profitable management of the estate, interest is allowed from the usual date.”

Loving v. Massachusetts Horticultural Society, 171 Mass. 401, per Mr. Justice Holmes.

“Whether the assets of the estate have been fruitful or unproductive does not affect the right of the legatee. He is in the same position as the creditor and entitled to be awarded interest at the legal rate for such time as he is kept out of his demand.”

Rutherford's Estate, 196 N. Y. 311.

Intent of Testator.

“The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator as expressed in his will shall prevail, provided it be consistent with the rules of law.”

Adams v. Cowen, 177 U. S. 471;

Johnson v. Wash. L. & T. Co., 33 App.

D. C. 242; 224 U. S. 224.

Item 14 contains an express provision for payment of interest on legacies "hereinbefore mentioned," and the omission of such provision from Item 18 may give rise to the *inference* that testator did not intend to have interest paid on the legacies bequeathed by Item 18.

The rule, however, seems to be that interest is to be paid unless a contrary intention on the part of testator is *clearly expressed* in the will. Such contrary intention was not clearly expressed in this will, and it may be argued that the word "hereinbefore" in Item 14 was not intended to exclude the legacies mentioned subsequently, but merely to fix the *rate* of interest upon the earlier legacies.

The court below first held that the rate applicable to Item 18 legacies should be 6 per cent in view of Section 1178 D. C. Code, and then found that testator must have been aware of that fact, and did not intend to have the less favored legacies under Item 18 entitled to a higher rate than the preferred legacies mentioned in Item 14. It may also be argued, however, in the absence of evidence on the point, that testator did not know the rate that would be allowed if he failed to specify any rate, or possibly the failure to specify a rate of interest in Item 18 was due to an oversight.

On the other hand, if testator is to be presumed to know the law, he may be presumed to know that the legacies would bear interest unless he expressly gave directions to the contrary. If he was anxious to forbid payment of interest, it would have been "easy to say so."

Item 19 disposes of the residue "after the payment *in full* of all legacies hereinbefore provided for." Possibly the words "in full" were intended to mean "principal and interest."

Rate of Interest.

Item 14 of the will specifies that interest is to be allowed on legacies "hereinbefore mentioned" at 5 per cent, but Item 18 contains no provision on the subject. Section 1178 D. C. Code provides that, in the absence of express contract, 6 per cent is to be allowed on judgments, decrees and also "upon the loan or forbearance of any money, goods or things in action."

In *Loving v. Massachusetts Horticultural Society*, 171 Mass. 401, Mr. Justice Holmes, referring to allowance of interest on legacies, said:

"Whenever allowed, it is allowed at the statute rate, although that is higher than that which trust funds usually earn in these days."

Welch v. Adams, 152 Mass. 74.

Bartlett's Estate, 163 Mass. 509.

Interest due legatees must be computed at the legal rate, although the money earned only 4 per cent.

Hoffman v. Pennsylvania Hospital, 1 Dem. Sur. 118 (N. Y. 1882).

In *Reid v. Dodge*, 44 App. D. C. 558, the will did not specify any rate of interest, but left \$10,000 to the executors to use the income for the support and education of testator's grandson. In allowing interest at

5 per cent, the court did not mention Section 1178 of the Code, but said:

“In view of the situation evidently existing in the estate of Taylor, it is equitable that this legatee of a life interest in the income upon \$10,000, given for his support and education, should be allowed interest *at 5 per cent* from the death of the testator.”

CONCLUSION.

Jurisdiction of Probate Court. Position Assumed by This Appellee.

This appellee, as executor and trustee, assumed a somewhat neutral attitude in the court below and follows a similar course here, but has some doubt as to whether the Probate Judge kept within the well-established jurisdiction of that court and confined his decision to the issues raised by the pleadings, which presented the sole question whether under the law and such incidental interpretation of the will as might be necessary, interest should be paid upon the legacies in Item 18.

Ordinarily it is within the province of the equity court to construe a will (*Vestry v. Bostwick*, 8 App. D. C. 452), but the Probate Court may do so to a limited extent for the purpose of ordering a proper distribution of the estate.

McIntire v. McIntire, 14 App. D. C. 337;

Kenaday v. Sinnott, 179 U. S. 606.

This appellee is vitally interested in having this question determined by a court of competent jurisdiction so that appellee will be protected in paying or in refusing to pay interest on the legacies bequeathed by Item 18.

Appellee has, therefore, endeavored to make a fair statement of the facts and has called attention to the foregoing authorities in an effort to aid this Court in its consideration and determination of the matter in dispute between the other parties to the proceeding.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,

Attorneys for Appellee, American Security and Trust Company, Executor and Trustee under the Will of Charles E. Wood, Deceased.

APR 18 1927

Court of Appeals, District of Columbia

APRIL TERM, 1927.

No. 4535.

JAMES R. CATON, *et al.*, Appellants,
vs.
AMERICAN SECURITY AND TRUST COMPANY, EXECUTOR AND
TRUSTEE, *et al.*, Appellees.

BRIEF FOR APPELLEES, MICHIGAN SANITARIUM AND BENEVOLENT ASSOCIATION OF BATTLE CREEK, MICHIGAN, AND CERTAIN OF THE HEIRS-AT-LAW AND NEXT OF KIN OF CHARLES E. WOOD, DECEASED.

FRANK J. HOGAN,
WM. H. DONOVAN,
*Attorneys for Appellee,
Michigan Sanitarium and Benevolent
Association of Battle Creek, Mich-
igan, as Residuary Legatee.*

STANTON C. PEELLE,
DALE D. DRAIN,
*Attorneys for Certain Ap-
pellee Heirs-at-Law and Next of Kin.*

PEELLE, OGILBY & LESH,
Of Counsel.

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Court of Appeals, District of Columbia

April Term, 1927

No. 4535

JAMES R. CATON, ET AL.,

Appellants,

vs.

AMERICAN SECURITY AND TRUST COMPANY,
EXECUTOR AND TRUSTEE, ET AL.,

Appellees.

Brief for Appellees, Michigan Sanitarium and Benevolent Association of Battle Creek, Michigan, and Certain of the Heirs-at-Law and Next of Kin of Charles E. Wood, Deceased.

Statement

Three separate briefs have been filed by counsel representing different appellants in this case. A brief has also been filed on behalf of the Executor, the American Security and Trust Company.

The appellees, viz., the Michigan Sanitarium and Benevolent Association of Battle Creek, Michigan, and certain of the heirs-at-law and next of kin, are joining in one brief, their interests being identical on the question now before the Court, although they are opposed one to the other in a suit now pending in the Supreme Court of the District of Columbia entitled "The American Security and Trust Company, a Corporation, vs. Eurnie I. Wood, et al., Equity No. 29,392," which proceeding involves the question of the identity of the beneficiary, "J. G. Kellogg Sanitarium of Battle

Creek, Michigan," named in Item Nineteenth of the Will, and its right to take under the Will, the said heirs-at-law and next to kin alleging the invalidity of the residuary clause, and the Michigan Sanitarium and Benevolent Association of Battle Creek, Michigan, contending for its validity and its right to take as such residuary legatee.

The American Security and Trust Company, as Executor and Trustee under the will of Charles E. Wood, deceased, filed in the Supreme Court of the District of Columbia a petition for instructions as to whether it should pay interest on some 88 legacies contained in Item Eighteenth of said will, and if so, at what rate, from what date, and to what date. (R. pp. 11-24.)

The only question passed on by the Court below, and the only question which was properly before that Court was whether the said 88 legatees were entitled to interest on their legacies. That question being answered in the negative, the question of the rate of interest and the time during which interest should be paid did not require the consideration of the Court.

On one side, claiming the right to interest, are certain of the said 88 legatees, and on the other side, denying the right, are certain of the heirs-at-law and next of kin and the Michigan Sanitarium and Benevolent Association claiming as residuary legatee.

The question was fully argued by counsel in the court below and in addition to the oral arguments memorandum briefs were filed with that court. The Court took the matter under advisement, and thereafter, in a carefully prepared and signed memorandum opinion (R. pp. 51-59) in which was discussed in some detail the structure of the Will and its provisions and the reasonable and necessary inferences to be drawn therefrom, the Court found that the 88 legatees were

not entitled to interest on their legacies and entered an Order accordingly. From that Order this appeal is taken.

The Will of Charles E. Wood is set out in full in pages 1 to 10 of the Record, and the petition of the Executor and Trustee for instructions appears on pages 11 to 24 of the Record. As the question at issue in this case is one as to the intention of the testator which cannot be determined by considering any synopsis of the Will or by the examination of particular provisions of the Will independently, but must be gathered from the whole Will, its plan and structure, as well as its provisions considered in connection with the character of the estate of which the testator was disposing, we feel that the Court will prefer to itself examine the Will and the Petition, and that any attempt on our part to set out at this point portions of the Will which we might deem pertinent to the issue would not be helpful to the Court.

In our argument following we will, perhaps contrary to the usual method, first take up what we conceive to be the applicable rules of Law and the authorities in support thereof and will then discuss the plan and structure of the Will and its provisions made with reference to the nature of the estate disposed of, and thus endeavor to arrive at the intention of the testator with respect to the time of payment of the legacies contained in Item Eighteenth. His intention in that behalf, coupled with the fact that he deliberately and expressly provided for interest at 5% per annum on the legacies of all those having special claims on his bounty, and then grouped in a single item, viz., Item Eighteenth, without mention of interest, gifts to those having no such claims, but whom in this generosity he desired to remember, will conclusively show that he did

not intend that such latter gifts should bear interest at the legal rate as contended by the appellants, or at all. Thereafter we will direct our attention to the arguments made by the several appellants.

Argument

I

THE RULE THAT GENERAL PECUNIARY LEGACIES SHALL BEAR INTEREST FROM ONE YEAR AFTER THE DEATH OF THE TESTATOR HAS NO APPLICATION WHERE AS IN THIS CASE A DIFFERENT INTENTION IS INDICATED BY THE WILL AND THE TIME OF PAYMENT IS POSTPONED.

The total amount of the legacies bequeathed by Item Eighteenth, as stated in the Petition of the Executor for Instructions (R. p. 12) aggregates \$201,000.00. If interest thereon should be allowed from one year after the death of the testator, as claimed by the appellants, the said interest at this time would amount to approximately \$217,000.00, a sum, it will be noted, considerably in excess of the aggregate principal amount of the legacies. This fact is not mentioned because of any contention on our part that it, standing alone, could aid or influence the interpretation of the Will with respect to the testator's intention, but to direct attention to the fact that the testator, when providing out of a spirit of generosity for old friends and employees of Wood, Harmon and Company, had in mind at the same time another object of his bounty, perhaps equally worthy, namely the relief of those who had suffered like himself, and to that end desired the construction in the East of a Sanitarium similar to the one at Battle Creek, Michigan, where he had been bene-

fitted, and purposely left the said legacy without interest in order to preserve to the residuum a sum sufficient to carry out the Sanitarium project. The fact that the interest now, when means are available for the first time to pay the principal of the legacies, considerably exceeds the amount of that principal, emphasizes the wisdom of the testator in denying interest to these secondary legacies if he seriously contemplated the creation of a trust for the purposes of a Sanitarium.

The question upon which the Executor sought the aid of the Court was as to whether it should pay interest on these legacies. As the answer to that question could be gathered from the Will itself, the Court found no occasion to resort to artificial rules of interpretation for assistance. The intention of the testator with respect to the time the legacies were to be paid and whether they should or should not bear interest must govern as to those questions as it must with reference to all other like questions which may arise under the Will, and such intention is to be ascertained if possible from the language used by the testator and the inferences necessarily and reasonably to be drawn therefrom.

“The fundamental rule governing courts in the construction of Wills is, so far as possible, to ascertain and give effect to the intention of the testator.” *Freylinghuysen v. New York Life Insurance and Trust Company*, 31 R. I. 150.

“In the construction of a will we seek the intent of the testator as exhibited by the words he has selected. Canons of construction may aid us. Based as they are upon general considerations, upon guesses as to what the average man would intend by this expression or that, we rest upon them in the absence of more certain indications.

Slight variations of phrase, however, or differences in arrangement, may lead us to opposite results." *In re Bump's Will*, 136 N. E. 295.

"Rules for the construction of wills are established for the purpose of carrying into effect the intention of the testator. They are only prima facie rules and therefore are not applied in cases in which the Court is convinced on examination of the instrument that the application of a particular rule would not effect but would thwart that intention. In such a case the rule must yield to the intention and not the intention to the rule." *Pike v. Walley*, 15 Gray's Rep. (Mass.) 345.

"Where the will affords no satisfactory clue to the real intention of the testator, the Court must from necessity resort to legal presumptions and rules of construction. But such rules yield to the intention of the testator apparent in the will, and have no application where the intention thus appears." *Couch v. Eastham*, 29 W. Va. 784. This was one of the cases cited in *Powell v. Drake*, 19 D. C. Rep. 334.

"There is no higher duty which rests upon a court than to carry out the intention of the testator when the provision is not repugnant to settled principles of public policy and is otherwise valid. Hence, to ascertain this intention is the first duty of executors and courts whose office it is to carry the will into effect. If its provisions are clearly apparent, no recourse to technical rules is necessary, nor, indeed, permissible, to establish its contents. It has often, therefore, been said by the courts that precedents are of little value in construing the provisions of any particular will. For all artificial rules of interpretation or construction can serve but the one purpose, to assist in arriving at the testator's intention; when that is ascertained there can be no use for rule or guide, for then the end is gained." *Woerner on Administration and Wills*, 3rd Edition 1923, Vol. 3, p.

1367, citing, among other cases, *Colton v. Colton*, 127 U. S. 300, 309-310. See also *O'Brien v. McCarthy, et al.*, 52 App. D. C. 183; *Presbrey v. Simpson, et al.* (1923) 53 App. D. C. 358.

There is a rule of law with respect to interest on general legacies which it is said supplies the intention of the testator where such intention can not be ascertained from the instrument itself. That is the rule, subject to certain exceptions not pertinent here, that where no time for payment is ascertainable from the Will, general pecuniary legacies are payable one year after the testator's death and bear interest from that time unless otherwise provided. It appears that the rule has been established for convenience and is founded upon the presumption that within one year after testator's death the executor will have been enabled to ascertain the condition of the estate, to collect the assets, and be prepared to pay the legacies. *Marconnier v. Preston*, 165 Pac. 72 (Washington, 1917). It is said that that was the rule at common law, although that is expressly denied by the United States Circuit Court of Appeals, Eighth Circuit, in *Dickey v. Dickey*, 94 Fed. 231, and other cases. However that may be, the rule was applied in this District in the case of *Powell v. Drake*, 19 D. C. Rep. 334. In that case there was no provision in the Will with respect to the payment of interest or as to time of payment of legacies. The Court could not ascertain from the Will itself the intention of the testator. It allowed interest at the legal rate of 6% from one year after the death of the testator. That decision was followed by Mr. Justice Gould in the case of *Reid v. Dodge*, 43 W. L. R. 546, where a legatee was claiming interest from the testator's death, the Court holding that in the absence

of anything in the Will from which a different intention of the testator could be ascertained interest was payable only after the expiration of one year from the testator's death. The legatee in that case was claiming interest prior to the expiration of the one year period. There are numerous cases in the reports where courts have applied the same rule in like circumstances. But in all the cases it will be found that the Courts recognized that there is no place for the application of that rule where the intention of the testator could reasonably be ascertained from the Will. And to make the rule inapplicable it is not necessary that the testator specify a particular date when the legacy shall be paid or that he expressly provide that the legacies shall not draw interest after one year from the date of his death, but, as stated in *Marconnier, et al., v. Preston*, 165 Pac. 72:

“It is a cardinal rule of construction that the intention of the testator, or testatrix, shall be ascertained from the provisions of the will, and when so ascertained be given effect. There is no reason why the intention of the testatrix, when gathered from all the provisions of the will, should not be as controlling as if that intention were expressed in direct and specific language.”

In the *Marconnier* case the testatrix directed her executors and trustees to pay certain pecuniary legacies, without direction as to time of payment, made bequest to certain charitable and religious organizations, and in a residuary provision specified that the remainder of the property should be used to establish a home for aged persons. It further provided that the executors and trustees should pay the legacies as rapidly as business judgment might require, without sacrificing the

estate, providing for legacies as much as possible out of notes and mortgages and certificates of corporate stock. Following this was a provision that bequests to charitable and religious organizations should be first paid, subject to the right of the executors and trustees, in case of sickness or misfortune of a legatee, to pay any legacy at any time. It appeared that if the pecuniary legacies were to draw interest from one year after the death of the testatrix, the amount which would go under the residuary clause would be diminished. The Court held that the testatrix intended that the pecuniary bequests should not be payable until such time as the executors and trustees, in the exercise of good business judgment and without sacrificing the estate, would be able to convert the estate into cash, or so much thereof as might be necessary to pay the legacies, and that therefore such legacies would not begin drawing interest until such time, though it was more than one year after the testatrix's death.

In *In re Gunning's Estate*, 83 Atl. 63 (Sup. Court of Pa. 1912), it was held that a legacy bears interest from the time it is payable under the terms of the will, the rule that interest runs from the expiration of a year from testator's death applying only when the will does not fix the time of payment, and that where testatrix provided for the sale of certain property, expressing the desire that it should not be sold for less than a certain price, and a long delay was due to an effort on the part of her personal representatives to procure the best price obtainable, it was error to allow interest on legacies from the proceeds of the sale from the expiration of one year from the death of the testatrix. In the course of its opinion, the Court cited *In re Lewis' Estate*, 52 Pitts. Leg. J. 367, as follows:

“The testator knew that it would be necessary to sell his real estate before there would be any funds which could be applied to the payment of the legacies; his provisions for his daughter Florence indicate that he anticipated there would be delay in selling it; and his intention seems to have been that the legacy should not become due and payable until the fund realized from the conversion of his real estate could be distributed. It follows therefore that no interest is to be allowed on these legacies.”

In *Goodman v. Palmer*, 195 S. W. 165 (Tenn. 1917), upon a petition for rehearing by an orphan asylum, residuary legatee, denying the right of general legatees to interest except from the date of the termination of a contest over the will, the Court sustained the contention of the residuary legatee, stating, however, that it was following the precedents of the courts of that jurisdiction, although admitting that the authorities were divided on the question. In *Powell v. Drake*, in our own jurisdiction, (19 D. C. Rep. 334) it was held that such a contest, in the absence of a direction in the will to the contrary, would not postpone the time of payment of the legacies. Of course that may very well be true, because the delay due to a contest of the will could have nothing to do with the intention of the testator as to the time of payment. Cases where the delay in payment of legacies could not have been contemplated by the testator are not in point here. We cite the case of *Goodman v. Palmer* because of the following statement which it contains:

“Interest is payable on money in general on the ground of delay in liquidation of the principal; so, also, with respect to legacies, it may be stated as a general rule, that it is payable on them from

the time the principal actually becomes due. 2 Roper on Legacies, 184. * * * They (general legacies), in their nature, carry interest as in the case of other claims, with that incident, but the interest is computed from the time the principal is due and payable, *if such time can be inferred from the will*; but, if not, and no time of payment is fixed, the law, for convenience, has prescribed the general rule that interest shall be computed from the end of one year from the testator's death. * * * The rule was adopted as one of convenience, and when in operation it tends to work an inequitable result, an exception to it should be raised. That which was intended to serve as a mere convenience in ordinary circumstances should not govern where the situation is different." (Italics supplied.)

In *Bank of Niagara v. Talbot*, 96 N. Y. S. 976, affirmed in a memorandum opinion, 77 N. E. 1181 (1906), the testatrix directed that "*not later than the expiration of six years after my decease, according to the best judgment of my executor, my property shall be converted into money and my estate fully settled and the distributive shares and legacies paid over to the person or persons entitled thereto, in the order in which their names appear in this instrument.*" (Italics supplied.)

The Court said:

"Thus it was provided that the legacies would not by the terms of the will become due and payable until six years after the death of the testatrix and consequently would not bear interest until after that period of time had elapsed. *Thorn v. Garner*, 113 N. Y. 198, 21 N. E. 149; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207, 21 N. E. 75; *Wheeler v. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315. In *Thorn v. Garner*, *supra*, the testator be-

queathed to his son \$1,000,000, to be paid within 18 months after the testator's death. It was held that the son was not entitled to any interest upon his legacy previous to the expiration of the time fixed for its payment.

"In the Van Rensselaer case the language of the will was: 'I hereby give and bequeath to my sister Elizabeth the sum of \$10,000.00 to be paid by my executors *when it shall be convenient for them*, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm left me by my brother Courtlandt, or otherwise, *if it shall seem best to them*.' (Italics supplied.)

"The legatee was entitled to interest from the time when sufficient of the proceeds of the farm sales had been realized to pay her legacy.

"In *Wheeler v. Ruthven*, it is held that: 'The rule that a legacy is payable one year after testator's death and bears interest from that time only applies in the absence of a direction in the Will, or other decisive indication therein, which, interpreted in the light of the surrounding circumstances, shows a different intention on the part of the testator.' "

In *In re Lewis' Estate*, 240 S. W. 493 (Mo. 1912), the Court said:

"The question herein is whether certain legatees in the will of John Lewis, deceased, are entitled to interest on their legacies. The controversy arose on exceptions to the final settlement of the executor, who allowed interest and figured same at the rate of 6 per cent on the unpaid portions of said legacies from one year after testator's death. Exceptors contended that the legatees were not entitled to interest. The probate court held that they were, and, overruling the exceptions, approved the final settlement. Exceptors thereupon appealed to the circuit court, where it was held that the legatees were not entitled to in-

terest. The executor and the legatees then appealed to this court." Affirmed.

In the course of its opinion, the Court said:

"Interest, in the sense in which the word is used in the connection here considered, 'is the compensation allowed by law for the deprivation of a legacy or distributive share beyond the period when it is payable according to the terms of a will or statute.' 2 Woerner on Adm'n. (2d Ed.) Sec. 458; 40 Cyc. 2093; *Good Samaritan Hospital v. Mississippi Valley Trust Co.*, 137 Mo. App. 179, 184, 117 S. W. 637.

"The phrase 'when it is payable according to the terms of a will' is important, for it is for the deprivation of the legacy beyond the time when it is payable or becomes legally due that interest is allowed. And if it can be gathered from the will when the legacy is payable, then that is the date at which the legacy becomes legally due. For a pecuniary legacy is a claim against the estate, which is established by the will. And a testator, in bestowing a legacy, is disposing of his own, and has a right to do it upon his own terms, and whatever terms he imposes in his will must be followed. He can provide that a bequest shall go into effect immediately upon his death, or he can postpone the payment thereof to some later date or until the happening of some specified event or contingency. If the will creates a legacy without disclosing testator's intentions as to when it shall be paid, then the law, with certain exceptions, says the legacy will become due and payable at the expiration of a year from testator's death, and it will draw interest from that date. *Davison v. Rake*, 44 N. J. Eq. 506, 16 Atl. 227; 18 Am. & Eng. Ency. of Law (2d Ed.) 793; 40 Cyc. 2094; 2 Woerner on Adm'n (2d Ed.) Sec. 458. This has been the law in Missouri heretofore. In *re Catron's Estate*, 82 Mo. App. 416, 421; *Way v. Priest*, 13

Mo. App. 555, Id. 87 Mo. 180; *Asbury v. Shain*, 191 Mo. App. 667, 675, 177 S. W. 666; *Good Samaritan Hospital v. Mississippi Valley Trust Co.*, 137 Mo. App. 179, 184, 117 S. W. 637. And such common-law rule has now been enacted into a statute, though this was not done until April 9, 1917, long after the legacies herein were given and the will established. See section 246, Laws 1917, p. 99, now section 237, R. S. 1919.

“But, as stated, if the will discloses when the legacy is to be paid, then it must control.

“‘The purpose at last in all such cases is to follow the will of the testator.’ *In re Catron’s Estate*, 82 Mo. App. 416, 419.

“And it is only from the time the legacy becomes due or is payable that interest could be said to accrue. The very terms of the definition of interest, hereinbefore quoted, requires this.

“‘Until the legacy is payable there is no fund to produce interest.’ *Good Samaritan Hospital v. Mississippi Valley Trust Co.*, 137 Mo. App. 179, 184, 117 S. W. 637, 639.

“‘When the time for the payment of a legacy is fixed by the will and there are no other controlling considerations, interest is due only from the time designated for payment of the legacy.’ 28 R. C. L. 354.

“Of course, the rule of law as to interest being allowable from one year after the death of the testator governs unless the will provides that interest shall accrue sooner or fixes the time of payment of the legacy later than the legal rule date.

“It is true, where a will creates a legacy with nothing therein to indicate when it shall be paid, nor postponing the payment thereof until a future date or the happening of some later contingency, the time when the legacy is due or payable is not affected by such expressions in the will as that it shall be paid ‘as soon as possible’ or ‘when practicable,’ or by other provisions concerning the convenient and profitable management of the

estate. 40 Cyc. 2095; 2 Woerner on Adm'n (2d Ed.) Sec. 458; Griggs v. Veghte, 47 N. J. Eq. 179, 19 Atl. 867; In re Williams' Estate, 112 Cal. 521, 44 Pac. 809, 53 Am. St. Rep. 224; Welch v. Adams, 152 Mass. 74, 25 N. E. 34, 9 L. R. A. 244. Nor, in such case, is the right to interest affected by the condition of the estate whereby funds are not available to pay a legacy at the time it is due. 40 Cyc. 2103; in re Ervings' Estate, 103 App. Div. 500, 92 N. Y. Supp. 1109. Likewise mere unproductiveness of the estate does not affect the right to interest, for the legatee is in the same position as a creditor, and is entitled to interest at the legal rate for such time as he is kept out of that which the will has said he should have. 40 Cyc. 2104; In re Rutherford, 196 N. Y. 311, 89 N. E. 820. However, by this is meant only that such expressions, of themselves and without more, are not sufficient to defeat the right to interest on the legacies for the time beyond which they are due and payable. As said in Hoagland v. Ex'rs. of Schenck, 16 N. J. Law, 370, 376, such general terms 'without other matter to give them point and construction, can be regarded as little else than a kind of formula, to which no distinct effect or operation should be given.' *This, however does not mean that, in order to defeat interest, the will must contain a provision specifically and in direct terms postponing the payment of the entire legacy to some later time than the law provides where there is an absence of testamentary direction. It is sufficient if, from all the terms and provisions of the will, it can be clearly seen that the legacies are not to be payable or due until some later time or contingency.*" (Italics supplied.)

Further, the Court quoted from *Parkhurst v. Ginn*, 228 Mass. 159, 174, as follows:

"It is the settled rule that 'interest is payable upon pecuniary legacies from the time when, by

the terms of the will or by rules of law, they become due and ought to be paid.' (Citation.) 'These legacies are not payable at a fixed calendar date either by the will or by the law. They become due only upon the happening of the contingency that principal of the estate becomes available therefor.'

"The legacies referred to in the above quotation were given by the will in these words:

" 'If and when (after the payment of certain other gifts and legacies specified) principal of my estate becomes available for distribution.' "

In the instant case, the legacies in Item Eighteenth of the Will of Charles E. Wood, deceased, were to be paid only in case there was anything available after prior legacies were paid in full.

In *In re Boyce's Estate*, 181 N. W. 735 (Wis. 1921), the testatrix bequeathed the residue of her estate in shares. On a petition for a construction of the will interest was allowed from one year after the death of the testatrix. On appeal, this was reversed, the upper Court saying:

"It is urged that no interest should have been allowed on these legacies because the contents of the will indicate an intention by testatrix that the legacies should not be due until the property had been converted into cash by the executors as provided in the will. The will contains the following: " 'I direct my executors to convert all my property into cash or its equivalent, as soon as the same can be conveniently and advantageously done, and to dispose of the proceeds as hereinafter provided, but, after a sufficient amount of property shall have been so converted to pay the specific legacies hereinafter provided for, and said legacies have been paid, if the remaining property can be divided satisfactorily to all the parties en-

titled thereto, as hereinafter provided,' or if the legatees could agree in writing to hold it in the manner specified, then 'the said property may be set off to them in accordance with said agreement in lieu of selling the same as hereinbefore directed.'

"In view of the nature and kind of property she owned and her financial obligations it is clear that the testatrix intended that the legacies to her daughters and granddaughter should be paid out of the proceeds of the sale of her real estate. The provisions of the will and these surrounding circumstances are significant and decisive indications that she intended the legacies should not be due until sufficient property had been converted into cash, and such conversion was to be accomplished by the executors within such time as it could conveniently and advantageously be done. These provisions show that the executors were not to make the conversion until it was advantageous to the estate, and that they were not limited to a year or other fixed period of time. Under these circumstances the executors had a reasonable time to effect the conversion. There is no showing that the conversion of the estate was unduly postponed and the trial Court so held. It appears that the cash to pay these legacies were paid the following May. Under all the provisions of the will it must be held that the will shows an intention by the testatrix that the pecuniary legacies to her daughters and granddaughter were not to be due until the property had been converted into cash and was available to pay them, and that the county court erred in allowing interest on such legacies."

In *In re Brandt's Estate* (Pa. 1924), the Court said:

"While the general rule is that legacies bear interest from one year after the death of the testa-

tor, that rule is not applicable in all cases. It may be modified by circumstances.”

It appeared in that case that it was advantageous to hold and manage the property for a time and this was acquiesced in by the legatee, appellant, who claimed interest from one year after the testator's death.

.. In *Budd v. Garrison*, 45 Md. 418, which was the principal case relied upon by the Supreme Court of the District of Columbia in *Powell v. Drake*, 19 D. C. Rep. 334, and which merely stated the general rule that “A pecuniary legacy bears interest from the time at which it is by the terms of the will made payable and if no time of payment is fixed by the will, it is payable within the time limited by law and bears interest from that date, that is, from the expiration of one year after the testator's death,” it was said:

“It is clear the intention of the testator must govern as to the time of payment of legacies, as well as upon any other point. *Hanson v. Browner*, 2 Md. 90, and as was said by Lord Hardwicke in *Heath v. Perry*, 3 Atk. 102, ‘cases of this kind, how far a legatee, who is not entitled to the payment of his legacy immediately, shall have interest in the meantime, depend upon particular circumstances. Some upon relationship, some upon the necessities of legatees *and most of them upon the particular penning of wills*, and there is hardly one case that can be cited that is a precedent for another. Some things are certain in these cases; for if a legacy is given generally at marriage or at 21, then the vesting and time of payment are the same, and shall not vest until marriage or 21. To go one step further, where the legacy has actually vested, as if given to A payable at 21, yet, it shall not carry interest, unless something is said in the

will that shows the testator's intention to give interest in the meantime."

See also—

Christian v. Catholic Church of St. John, 110 Atl. 579 (N. J. Eq. 1920).

In re Hoskinson's Est., 112 Atl. 125 (Pa. 1920).

Stenneck v. Kolb, 111 Atl. 277 (N. J. 1920).

Wheeler v. Ruthven, 74 N. Y. 428.

Valentine v. Ruste, 93 Ill. Rep. 585.

In re Gans' Will, 114 N. Y. S. 975.

In re De Freest's Will, 200 N. Y. 445.

120 Misc. Rep. 653 (Surrogate's Court, 1923).

We submit that the foregoing cases establish that where the time of payment of pecuniary legacies, or whether they shall or shall not bear interest, can be gathered from a reading of the will as a whole and a consideration of all its terms and provisions, the rule that general legacies bear interest from one year after the death of the testator has no application; and that it is not necessary in order to defeat interest that the will contain express provisions postponing payment or denying interest, but only that the intent of the testator be reasonably ascertainable from the language and terms which he has used coupled with the surrounding facts and circumstances.

There are cases which on casual reading may not appear to be wholly in conformity with the cases which we have cited, but a careful examination will we believe disclose that none of them is in truth and in fact opposed to the conclusions we have stated, and may be differentiated by the character of the wills which were the subject of construction and the language, terms and provisions contained therein. For instance, some of the cases are governed by special statutes; in

some funds sufficient to pay the legacies were available at the end of the administration year; in others assets sufficient to pay the legacies were at all times available during the period of the delay; in some the property withheld consisted of interest-bearing securities which it was inequitable to keep from the legatees, etc. It may not be amiss at this point to call attention to the fact that in the present case the estate which was relied upon to pay the legacies contained in Item Eighteenth of the Will consisted of the proceeds of sales of lands, which proceeds could not be available except as and when the sales were made, that is, at such time, within the contemplation of the testator when drawing his will, and as clearly indicated therein, as they would produce something like their real value and as would not be detrimental to others associated with him in the business of developing and marketing them.

II

THE CHARACTER OF THE ESTATE OF WHICH TESTATOR WAS DISPOSING AND THE PLAN AND PROVISIONS OF HIS WILL SHOW CLEARLY THAT IT WAS HIS INTENTION THAT INTEREST SHOULD NOT BE PAID ON THE LEGACIES IN ITEM EIGHTEENTH.

With the principles established by the above authorities in mind, we will take up the Will for the purpose of ascertaining whether the intent of the testator cannot readily be gathered from the Will itself and what that intent was with reference to interest on the bequests which he made.

Upon taking up the provisions of the Will, it will, we believe, assist the Court materially in understanding the reasons which actuated the testator in adopt-

ing the scheme or plan of the Will which he made and the situations which he was endeavoring to meet by the provisions and terms which he incorporated therein if the Court will have in mind the nature and character of the testator's Estate and its status and value at the time he made his Will, as indicated by paragraphs 3, 6 and 7 of the Petition for Instructions, filed by the Executor and Trustee (R. pp. 11, 14-15); the fact that he was active in many enterprises and projects in the course of development; that his interests were varied and involved; and that they were in large part of such a character at the time the Will was made that their prospective worth was largely in excess of their then value. And when the Court takes up the Will it will find that in the preparation of that instrument the testator had these things clearly in mind. The plan of the Will, the language and terms employed, and the provisions made by the testator clearly indicate that he realized that his Estate was not such an one as would permit of its closing up at the end of the usual administration period fixed by law and the payment of all legacies at one time; that his main reliance for the payment of legacies, and especially the legacies contained in Item Eighteenth, and the carrying out of the objects and purposes he had in mind in drafting his Will, was his proportionate share in the returns from sales of lands owned or controlled by Wood, Harmon & Company and the allied corporations in which he was interested; that forced sales of those lands would be detrimental to the Estate and to those who had been associated with him in the purchase, development and disposition thereof, and that he therefore inserted provisions in his Will calculated to prevent their sacrifice and the consequent reduction

of the proceeds out of which he anticipated that the legacies would be paid.

In Item Third of the Will, the Testator prohibited his executor from selling or disposing of his stock in the Greater New York Development Company or the Brooklyn Development Company or stock in any New York Company which he might own, "until such time as an adequate price, as near as may be the par value thereof, can be obtained." As stated by the Executor in paragraph 20 of its petition filed in the lower Court in April, 1924, referred to in paragraph 3 of Petition of the Executor for Instructions (R. p. 11), "these interests, by reason of their very nature, were purely speculative, and had no market value because dependent upon so many conditions incident to such enterprises." Whatever was received from them by the Estate would be in the way of liquidation dividends as the lands which they owned were sold and paid for. It was out of the net proceeds of the sales of these lands, of which the Estate would receive its proportionate share, that the legacies had to be paid. As stated in Paragraph 26 of the Petition filed by the Executor in April of 1924, if it were not for the interests of the testator in the net profits of Wood, Harmon & Company and of the corporations hereinbefore mentioned the Estate would not have been capable of paying anything more than a small percentage of the legacies to his widow. Here was an express limitation upon the Executor as to the time these properties should be sold; and as the testator knew, as indicated by his Will, that the ability of his Estate to pay the legacies depended upon the money received from the proceeds of these sales, the conclusion is irresistible that he did not intend that they should be payable before that time, and therefore, un-

der the cases hereinbefore cited, they could not bear interest before that time.

By Item Twentieth of the Will the Testator, by the use of words which are equivalent to an express direction to his Executor, required that all consistent leniency should be extended in settling his interests or holdings with the remaining members of the partnership of Wood, Harmon & Company and with all firms, trusts or corporations with which the said firm might have business relations at the time of his death; and that like leniency should be extended in settling his interests in any corporation composed of the members of said firm of Wood, Harmon & Company and that the Executor should facilitate by all means in its power the business of said firm or corporation or corporations, and, the Testator continued, "I hereby give to my said Executor full discretion and power as to the settlement of all matters connected with the said firm of Wood, Harmon and Company, or with any corporation or corporations, composed of the members of said firm, which may succeed to the business of the said firm, hereby absolving and releasing my said Executor from any personal liability for or on account of any loss connected either with the conduct of the said firm, or any such corporation, or in the winding up of either, which shall not be directly caused by either willful default or negligence." So, here again was an express limitation upon the power of the Executor. Consistent with the interests of the Estate it was not to do anything which would be detrimental to those who had been the testator's associates in business. To force the sale of the lands held by the said Companies at a sacrifice would be detrimental to them and would be inconsistent with the interests of the Estate as well. The discretion given his executor was

as to the manner and terms rather than the time of settlement, as the testator in Item Third had expressly prohibited the sale of his stock in the development companies until such time as an adequate price as near as might be the par value thereof could be obtained, and in Item Twentieth had expressed it as his will that all consistent leniency in the conduct of their business and the settling of their affairs should be accorded not only to Wood Harmon & Co., but to any corporation or corporations that might succeed that firm. In *Marconnier v. Preston*, 165 Pac. 72, the Supreme Court of Washington, in 1917, in denying interest where the intention of the testator as to postponement was not nearly as clearly indicated as in this case, said:

“No claim is made that the estate has not been properly managed. The reason that the bequests have not been paid is that, owing to business conditions, the estate, in the judgment of the executors and the trustees, could not be converted into cash without great sacrifice. While the Will specifies no time at which the legacies shall be paid, yet it is apparent, when all the provisions thereof are considered, that the testatrix did not intend their payment until such time as the executors and trustees, in the exercise of good business judgment, should be able to convert the estate, or sufficient thereof to meet the legacies, into cash without sacrificing the estate.”

That the course which has been followed by the American Security and Trust Company as Executor in the administration of the Estate was the correct one and in conformity with the powers and discretion reposed in it by the Testator is evidenced by the facts which it sets forth in its Petition for Instructions, Paragraphs 6 and 7 (R. pp. 14-15. It therein appears

that at no time within nine years after the date of the Testator's death would the Estate have been sufficient to pay the debts, the legacies of \$235,000.00 to and for the use of the widow, and possibly not over 50 per cent of the preferred legatees named in the first part of the Will; and that it is only by reason of the fact that the Estate has been kept open up to this time that the legatees under Item Eighteenth will receive anything at all.

Let us observe the plan of the Will and the effect on the several legacies of the working out of that plan, as affected by the value of the Estate and the time it is closed.

According to Paragraph 21 of the Petition filed by the Executor on May 17, 1918, referred to in Paragraph 3 of the Petition for Instructions (R. p. 11), the original and supplemental appraisements of the Estate made shortly after the death of the testator showed a total of \$352,375.08, which of course was an estimate only, based on the facts which the executor and appraisers were able to gather at the time. According to Paragraph 16 of said Petition the debts and obligations of the testator amounted to \$227,666.81, which of course did not include the costs of administration. The Will contains more than one hundred separate bequests, totaling \$564,400.00, in cash, and contemplated a substantial residuum for the construction of a Sanitarium. It is evident that the testator drew his Will in contemplation of its prospective rather than its present value. He did not treat all the legatees as of the same class. He divided them into several classes, each class taking only provided there was any remainder after the preceding class was paid in full, so that the legatees of one class could not know what, if anything, their respective legacies would amount to

until all those in the class preferred to them had been fully taken care of.

First, he preferred his wife. To her, directly and in trust for her benefit, he made certain devises and bequests, which were to take precedence over all others.

Next, he preferred his relatives and those to whom he was under obligation for services rendered, the said legatees being included in Items Eighth, Ninth, Tenth, Eleventh and Thirteenth.

In Items Fourteenth and Fifteenth, he said:

“ITEM FOURTEENTH: Should it be impossible for my executor hereinafter named to pay the legacies hereinbefore mentioned within the time given by law for the settlement of my estate, then it is directed to pay them as soon as it is possible for it to do so, together with interest on the said legacies at the rate of five per centum from the expiration of the legal period within which my said executor is required to make settlement, until paid. It being my desire under all circumstances however, that the devises and bequests made to and for the use and benefit of my beloved wife, EURNIE I. WOOD, shall have preference in payment both as to principal and interest.

“ITEM FIFTEENTH: Should the rest and residue of my estate after the payment in full of my debts and funeral expenses and the devises and bequests made to and for the use and benefit of my beloved wife, EURNIE I. WOOD, prove insufficient to pay all the other legacies hereinbefore mentioned in full, then I direct that the said legacies be scaled down sufficiently to give to each legatee a proportionate share of whatever amount there may be left for such purpose.”

It will thus be seen that the testator was not certain that his estate would be sufficient to pay the foregoing

legacies, and directed that if it was not, then each legacy should be proportionately scaled down.

Next, he bequeathed to his trustee, out of the rest and residue of his estate, \$10,000 for a monument.

Then he said:

“ITEM EIGHTEENTH: I give and bequeath, out of the rest and residue of my estate, over and above the legacies hereinbefore mentioned and the trusts hereinbefore created, the following sums of money to personal friends, and old and faithful employees of the firm of Wood, Harmon & Company as follows:

(Here he names 88 different persons.) At the end of the Item he further said:

“And should the rest and residue of my estate prove insufficient to pay all the legacies mentioned in this Item of my Will in full, then I direct that the said legacies shall be scaled down sufficiently to give each legatee under this Item of my Will a proportionate share of whatever amount there may be left of my estate for such purpose.”

It will thus be seen that as to the legatees in Item Eighteenth they constituted a separate and independent group from those which had gone before, and that they were to take only in case there was any residue “over and above the legacies hereinbefore mentioned and trusts hereinbefore created.”

It will be noted further that this was a natural division for the testator to make, because all the prior legacies were to relatives who had a special claim upon his bounty and to one or two others to whom he expressed himself as under obligations for services rendered.

The legacies in Item Eighteenth were contingent upon all the others being paid in full, and it could not be known what those legacies would amount to, if

anything, until all the others were fully provided for. Legacies of this kind are payable only when the contingency happens; the contingency in this case being that something remained of the Estate after all prior legacies were paid; and it is absolutely settled that the legacies can bear interest only from the time they are payable. Many cases might be cited to that point. We deem it sufficient, however, to call attention to a statement contained in *Parkhurst v. Ginn*, 117 N. E. 202 (Mass., 1917), which is particularly in point as follows:

“These legacies are not payable at a fixed calendar date either by the Will or by law. They become due only upon the happening of the contingency that principal of the Estate becomes available therefor after satisfying all prior legacies absolute and contingent. That event happened according to the present decision upon the facts here disclosed on April 11, 1916. It cannot be said to have occurred earlier than that date. The absolute legacies of \$35,000, therefore, bear interest at the rate of 4 per cent per annum since that date.”

The allowance of interest on general legacies from one year after the testator's death is not a mere arbitrary rule to be applied in all cases. Its application is coupled with the requirement that there shall be no expression of the testator on the subject from which this intention can be gained. In this case, by Item Fourteenth of his Will the testator has expressly designated those legacies on which interest shall be paid, and has even gone so far as to fix the exact rate of interest which shall be paid, a rate which he must be assumed to have known was lower than the legal rate in this District.

It is perfectly clear that if the testator intended that *all* legatees should receive interest on their legacies he would not have deliberately selected out and expressly provided for interest to some of them only. *Expressio unius est exclusio alterius*. In the case of *In re Knight's Estate*, 135 N. W. 379, (Neb., 1912) the Court said:

“If the Will gives a specific legacy of money to each of three persons respectively, and expressly provides that two of such legacies shall not bear interest in any event, the presumption is raised that the testatrix intended that the third legacy, not so limited, shall bear interest.”

Conversely, and with more reason it may be said that if a will gives specific legacies of money to designated members of two separate groups and expressly provides that the legacies in one group shall receive interest, the presumption is that the testator intended that the legacies comprising the second group, not so provided for, shall not bear interest.

It cannot reasonably be said here that the testator said nothing about interest on the legacies contained in Item Eighteenth because he anticipated that they would receive the legal rate of interest anyway, as that would put him in the position of fixing a lower rate of interest, namely 5 per cent, to be paid on those legacies which he had expressly preferred, and for the payment of which he manifested in Item Fourteenth a particular solicitude, by expressly directing his Executor to pay such preferred legacies as soon as it was possible for it to do so, if it should be found impossible to pay them within the time allowed by law for the settlement of his Estate.

Nor can it reasonably be said that his failure to pro-

vide for interest on legacies in Item Eighteenth was an inadvertence. The plan of his Will shows that he had in mind all the objects of his bounty when he started out to prepare it; that he deliberately placed in one group those to whom, because of relationship or personal services rendered, he felt himself peculiarly obligated, and whom, therefore, he felt should be compensated by interest on their legacies should it turn out to be impossible for his Executor to pay them within the usual administration period; and in another group he placed his personal friends and employees of his firm whom, in a spirit of generosity, he wished to remember. At the same time he apparently had in mind another even more generous object, and that was to help to make available in the eastern part of the United States to sufferers like himself a sanitarium such as the one whose methods and treatment he had found to be beneficial. He did not, therefore, leave the residuum of his Estate to go where the law might cast it. He expressly dedicated it to this particular object. As heretofore stated, if interest is allowed on the legacies in Item Eighteenth, then the amount which would go under Item Nineteenth toward the construction of the sanitarium would be diminished to the extent of such interest, and there is nothing to indicate that the testator had any such intention.

The accounts and petitions filed by the Executor in this Court, including the present Petition for Instructions as to interest, show that at no time before the present were there sufficient funds remaining after the preferred legacies were paid to pay the legacies in Item Eighteenth, and apparently the legatees under that Item have realized that their legacies, being payable out of the proceeds of the sales of the lands held by the concerns in which the testator had been interested,

and also being payable after all prior legacies were discharged were not due and could not have been intended to be payable until such lands were sold in the ordinary course of development and said prior legacies were paid. To award them interest now, in an amount greater than the principal of their legacies, or in any amount, would be to give them something which they could never have reasonably expected to receive and which the testator never intended they should receive to the detriment of the residuary legatee.

III.

POINTS OF ARGUMENT IN THE SEVERAL BRIEFS OF APPELLANTS.

First let us call attention to the fact that on p. 7 of the brief for "Certain of the Appellant Legatees" it is stated that the brief is filed on behalf of all of the legatees named in Item Eighteenth of the Will except two. We take it that what Counsel meant to say was, as they said in their answer (R. p. 49) that their brief is filed on behalf of the nine legatees who signed the answer and of any other of the legatees named in Item Eighteenth who might desire to avail themselves of it. The suggestion is perhaps not important except as indicating the possibility that some of the remaining seventy-nine legatees who did not sign the answer may not have the same notion as to their rights in the matter.

(a) *Point that legacies in Item Eighteenth are demonstrative legacies.* (Brief for "Certain Appellant Legatees," p. 7.)

In the same brief, under Subdivision I of the Argument, the point is made that "The legacies under Item Eighteenth of this Will are demonstrative pecuniary legacies." We fail to see the pertinency of a discussion as to whether the legacies are or are not demonstrative legacies, or how the fact that they are demonstrative, if that be so, could help the appellants. Assuming for the sake of argument that legacies payable out of the funds, if any, left over after paying other legacies and trusts are demonstrative legacies, the result of that would seem to be that the fund out of which payment was to be made being specified, such payment could not be made, and could not in fact be due, until the fund was available, and therefore no interest could accrue before that time, unless the Will provided to the contrary.

A legacy payable out of some designated fund or from some specific source available or in existence at the time the will is prepared or to be available at the death of the testator is not the same thing as a legacy directed to be paid from a source which the testator, by the plan and wording of his will, indicated might never develop or if it should exist at all could not come into being until some time in the future.

In *Darden v. Orgain*, 45 Tenn. 211, 215, it was held that a legacy of a specified sum of money, to be paid out of the proceeds of the sale of certain land which the Executor was directed to sell, was a demonstrative legacy and drew interest only from the time of the receipt of the purchase money by the Executor. See also *Trippe v. Frazier*, 4 H. & J. (Md.) 446; *Croom v. Whitfield*, 45 N. C. 143; *Van Rensselaer v. Van Rensselaer*, 113 N. Y. 207.

It appears from Sec. 7 of the Petition for Instructions (R. p. 15), that even at the time the petition was filed sufficient of the lands in which the testator had an interest had not been sold to enable the Executor to pay the legacies in question, and this, not being denied, the lower court so found.

(b) *Point that legacies in one clause may not be cut down by construction depending upon other and distinct paragraphs of the Will.* (Brief for "Certain Appellant Legatees," p. 9; Brief for J. Barrett Carter, Trustee, pp. 5-6.)

The question presented here is not, as suggested in the brief for the appellant J. Barrett Carter, Trustee, a question of whether one provision in a Will may be changed inferentially by an independent provision, or, as suggested in Sub-division II of the brief for "Certain of the Appellant Legatees" whether a particular interest or estate bequeathed or devised by one item of a Will may be cut down by raising a doubt from some other subsequent item or clause. In support of the latter, Counsel cite certain authorities which we have no reason to question, but which we submit, are not applicable to the facts here. For instance, one of the cases cited to this point in the court below was *Roseboom v. Roseboom*, 81 N. Y. 356. In that case the testator, by the first clause of his Will, gave his wife an absolute fee in one-third of his estate, and in a later part of the Will provided that at her death the same property should be equally divided among his children. The court held that his intention undoubtedly was that all his *remaining* property, after the one-third to his wife, should be divided

among his children at her death. That case and other cases cited it will be found were all cases where independent clauses, complete in themselves, created in clear and decisive terms different and completely defined estates with no apparent design to connect one with the other or to limit one by the other. Here there is no attempt to cut down such an estate or to interfere with the character of any estate. The bequests here given may be regarded as in two classes, one with a provision for interest, the other without any provision about interest. The appellants are apparently endeavoring to enlarge the legacies of the second class without regard to what the intention of the testator may have been as indicated by his Will as a whole. In other words, by their argument they assume that where interest is attached expressly to one class of legacies and is not given to a following class, the law will step in immediately and give such following class interest as well, and that nothing in the Will which may indicate a different intention on the part of the testator can be referred to which may cut it down or take it away. That, of course, is entirely erroneous. The purpose of the rule with respect to interest on legacies, as we have had occasion to say heretofore, is merely to supply the intention of the testator where none is ascertainable from the Will. If the intention may be gathered from the Will, then the rule must yield to it. It is clear, therefore, that appellants can not correctly start off with the assumption, as they attempt to do, that the first class of legatees is expressly given interest at 5%, and the second and concededly less favored class is given interest at 6%, and then, using authorities which might be apt to that situation, argue that one can not be cut down by inference from the other.

In the last analysis the question always is, what was the intention of the testator as indicated by the whole Will taken together, and the very authorities which appellants cite expressly recognize and emphasize that as the controlling rule, including the case of *Montgomery v. Brown*, 25 App. D. C. 490. It can not properly be argued that Item Eighteenth of the Will should be read as if it stood alone and independent of other provisions of the Will and that, as standing alone, there is nothing said about interest, the bequests therein made must, under a certain rule of law, bear interest from one year after the death of the testator. Such an argument of course ignores the cardinal rule that the intention of the testator shall be ascertained from the whole Will and when so ascertained be given effect. As was said in the case of *Marconnier v. Preston*, 165 Pac. 72, there is no reason why the intention of the testator, when gathered from all of the provisions of the Will, should not be as controlling as if that intention were expressed in direct and specific language.

See also *Rutherford v. American Security & Trust Company*, 12 Fed. Rep. 2d 156, 54 W. L. R. 290, in which it was said that a concession by appellants "that a testator's intention is the controlling factor in the interpretation of wills, and that the whole will must be searched to find such intention," was but a recognition of the rule controlling the courts. Citing *Colton v. Colton*, 127 U. S. 300; *Adams v. Cowen*, 177 U. S. 471; *Gibson v. Gibson*, 53 App. D. C. 380, 292 Fed. 657, 51 W. L. R. 711.

If the testator had said nothing in his Will about interest or had not said anything indicating his intention to postpone the time of payment, then appellants might with more reason invoke the rule upon which they rely.

But here the testator took pains to name those to whom interest should be paid and also took pains to state it as his intention and will that the properties, the sale of which was to produce the moneys to pay these legatees, were not to be sold to the detriment of his associates in business or until they would bring something like their real worth, and that even after such sale the legacies in Item Eighteenth should not be paid until all prior preferred legacies were paid in full.

As a matter of illustration: If a testator should say in Item I of his Will "I give to my wife, A, \$3,000"; in Item II, "I give to my sons, B and C, each \$2,000"; in Item III, "I give to my daughters, D and E, each \$1,000"; in Item IV, "Each of the above legacies shall bear interest from the expiration of the legal period of administration if not then paid"; and then, in Item V, "I give to my good friends, F, G, H, I, etc., \$1,000 each"; without saying anything about interest, can it reasonably be said that because of the rule referred to by appellants the legatees named in the Fifth Item, as well as those named in the preceding Items, would have a right to receive interest, or is it not a fact that would have to be conceded that the intention of the testator was clear that only those named in the first three Items should receive interest? And if to that was added a provision postponing the payment of the legacies in the Fifth Item until some time in the future, could there be any question with respect to the intention of the testator on the subject of interest, bearing in mind that the rule invoked by appellants is applicable only where there is no expression in the Will as to time of payment of legacies and nothing to indicate the intention of the testator that they should not bear interest?

We submit that even if the rule with reference to cutting down estates which appellants had in mind were properly stated, which we do not concede, the facts in the case now before the court do not lend themselves to the application of that rule nor to the argument of Counsel, and that therefore none of the cases cited by Counsel are in point. A casual examination of those cases by the court will disclose that they had to do with questions as to the character of estates in realty which the testators conveyed by certain language—life or fee or otherwise (*Barksdale v. White*, 28 Gratt. 225; *Johns Hopkins University v. Garrett*, 128 Md. 343; *Bailey v. Sanger*, 108 Ind. 264; *Smith v. Ledsome*, 95 W. Va. 429; *Goffe v. Goffe*, 37 R. I. 542); identification of devisees intended by testator (*Harvey v. Johnson*, 111 Miss. 566); whether precatory words following an absolute devise amounted to a direction or a suggestion (*Sands v. Waldo*, 165 N. Y. S. 654); identification of property referred to by testator (*In re Campbell*, 27 Utah 361); and that while the court referred to the rule relating to the cutting down of completely defined estates by inference from ambiguous subsequent clauses, that rule played very little part in the determination of the questions which were before the several courts.

The statement of abstract rules, such as made in briefs of appellants, we believe can be of little or no assistance to the court. This is peculiarly a case where it is wholly unsafe to rely on so-called rules which the litigants may cull from the contexts of decisions, and, we may say, it is unfair to the decisions themselves. It is only where the facts are similar that the citation and the application of a particular rule can be of help,

and we submit, that the facts in none of the cases stated by appellants have any similarity to those in this case.

In the case of *Heath v. Perry*, 3 Atk. 102, speaking of will cases, Lord Hardwicke said—"There is hardly one case that can be cited as a precedent for another." In another case cited by appellants, it was said—"Rules which have been laid down in particular cases must not be given and the courts have been careful not to give them, a too literal and inflexible application."

(c) *Point that "The intention of the testator which controls is that expressed in the Will."* (Brief for "Certain Appellant Legatees," pp. 16-19.)

In Sub-division III of the Argument in the brief for "Certain Appellant Legatees," it is declared that "the intention of the testator which controls is that expressed in the Will." We concede that, and we also concede the correctness of every authority cited which lays that down as the rule. That does not mean, however, that each clause or provision of the Will must be considered as independent of every other clause or provision, but on the contrary, it means that the intention must be drawn from the Will as a whole. As the court will have seen before reaching this point in our brief, our reliance is placed on this very principle, our contention being that the intention of the testator that the legacies in Item Eighteenth should not bear interest is indicated by the Will itself, and that there is therefore no necessity and no warrant for calling upon rules of law or rules of construction to supply intention. In those instances, as in other instances which we have had occasion to point out, the appel-

lants in their argument proceed from the premise that nothing having been said about interest in Item Eighteenth, interest automatically attaches to the legacies by operation of law. That we again assert is erroneous, because before the rule can apply it must appear that the intention of the testator as to interest can not be gathered from the Will.

(d) *Point that legacies in Item Eighteenth will not abate in favor of residuary legacies.* (Brief for "Certain Appellant Legatees," p. 19.)

Sub-division IV of the argument in the brief for "Certain Appellant Legatees" is headed "Item Eighteen legacies entitled to interest." So far as we can gather, the argument at the beginning of this sub-division is directed to the proposition that interest at the rate of 6% per annum is a part of each legacy in Item Eighteenth and may not be abated in favor of the residuum of the estate. That erroneously assumes the existence of a rule which arbitrarily attached interest to those legacies. The case of *Silsby v. Young*, 3 Cranch 249, is cited with reference to the time the question shall be determined as to how much is payable under the Item Eighteenth legacies, the decision being written by Chief Justice Marshall. That case had to do with the abatement of legacies. We fail to see its application here. The question here is not whether there should be any abatement of the legacies in Item Eighteenth in favor of the residuary legatee, nor whether interest should be denied them in favor of the residuary legatee. The question before the court, and the only question, is, whether they are entitled to interest under the terms of the Will.

(e) *Cases cited in briefs of appellants in support of the claim that legacies in Item Eighteenth are entitled to interest—distinguished.*

Powell v. Drake, 19 D. C. 334. In this case the Executors questioned the right of legatees to receive interest on their legacies during the pendency of a contest over the Will, and not because of any provision contained in the Will. The court held that they were entitled to interest from one year after testator's death. As we have had occasion to point out heretofore, cases of this kind are not in point, because postponements made, or delays occurring, by reason of situations arising subsequent to the death of the testator and not within his contemplation at the time he made his Will, could in no way reflect his intention. In the cases cited in *Powell v. Drake*, as well as in the principal case, the delays arose by reason of will controversies. Such cases are not like the case at bar, where the testator's intention, both as to time of payment and interest, may be gathered from the Will, and we do not deem it necessary to discuss any other like cases cited by appellants.

Reid v. Dodge, 43 W. L. R. 546. In this case the question, so far as it related to interest, was whether or not it should be paid, not from one year after the death of the testator, but within the year following his death. This case also appears in 44 App. D. C. 558, and the question, like that in the case of *McLane v. Cropper*, 5 App. D. C. 276, which it follows, was whether the legatee of a life interest which was given expressly for his support and education, was entitled to income during the first year after the testator's

death. The court found in the affirmative. It of course has no application here.

Davison v. Rake, 44 N. J. Eq. 506. In this case there was nothing in the Will to indicate any intention on the part of the testator that the time of payment of the legacy should be postponed or that interest should not be allowed. The court cited a sample of the legacies as follows: "I give and bequeath to my daughter, Ellen Rake, the interest of \$800, during her natural life, which said money is to be divided among her heirs equally at her death." The question was whether, under a statute, interest was payable one year after the testator's death, or one year from the time the Will was admitted to probate. We do not see the pertinency of this case here.

Borher v. Otterback, 21 D. C. 32. This case was cited by appellants in the court below and is also cited in one of the briefs here. The particular legacy on which the question of interest arose was payable by the express terms of the Will, with interest, when the legatee reached the age of sixteen years. The legatee failed to claim her share of the estate from her mother, who was executrix, for a period of twenty-seven years. The court allowed interest only from the death of the mother.

Appeal of *Koons*, 6 Atl. 377, 113 Pa. 621, cited in the brief of appellant J. Barrett Carter, Trustee, p. 11. In this case there was nothing in the Will to indicate that payment was to be postponed, and nothing about interest. A peremptory statute of the State of Pennsylvania provided that in such case the legacy was due one year after the death of the testator and interest began to run from that time. Nevertheless, the court indicated that in the presence of language or circum-

stances showing that the testator could not have intended the legacy to be payable at the end of the year, the statute would not have been applied.

Wood v. Penoyre, 13 Vesey, Jr. 326, cited in brief for "Certain Appellant Legatees," p. 27. In that case the testator gave to Wood and Penoyre, as Trustees, 6,000£, secured to them with interest at 5% upon a mortgage, upon trust to carry on litigation then pending for the recovery of the money in case it should not be paid in testator's lifetime, 2,500£ of said mortgage "when the same shall be recovered" to be invested in "Government or other good securities," and to pay interest or dividends to the testator's niece for life, and after her decease, to divide the trust money among her children equally. The Will also contained the following provisions:

"And I direct that the legacies hereinbefore given to my servants and all other legacies not exceeding 100£, shall be paid immediately after my decease, and the other legacies (which included the 2,500£ legacy) with those given to charitable uses, within six months after my decease."

The money due on the mortgage was outstanding at the death of the testator and also at the death of the niece. It was afterwards received by the surviving Executors, with a considerable arrear of interest. The surviving children of the niece sought to recover interest on the 2,500£ from the death of the testator, or if not from that time, then from the end of six months after his death, rather than from the time of recovery on the mortgage. It will thus be seen that this was a case where interest was claimed within the year following the death of the testator, and the Mas-

ter of the Rolls applied the one year rule. The facts in the case show that it has no similarity whatever to the case at bar.

We do not wish to burden the court by taking up each individual case which appellants have cited to the rule about interest on legacies. We will content ourselves by saying that we do not believe that it is a correct and complete statement of the rule that pecuniary legacies ordinarily bear interest from one year after the death of the testator. The rule, with several exceptions where interest is allowed from the death of the testator, is that unless the Will provides otherwise interest runs from the date general pecuniary legacies are payable, and they are payable, in the absence of anything in the Will indicating a contrary intention, one year after the death of the testator. The inquiry is as to when the testator intended the legacies should be paid. If nothing is said in the Will indicating a contrary intention on the part of a testator, the law says they shall be paid one year after the testator's death. Interest then follows as an incident to the right of the legatee to have his legacy at the expiration of the year, provided there is nothing in the Will to indicate the testator's intention that no interest shall be paid.

As to all those cases cited to the proposition that the time when legacies are due or payable is not affected by such expressions in the Will, as that they shall be paid "as soon as possible," or "when practicable," or other provisions concerning the convenience and profitable management of the estate, or that the estate was unproductive, and the like, we may concede that that may be true where there is nothing in the Will indicating when the legacies shall be paid or an inten-

tion on the part of the testator that the payment thereof shall be postponed until a future date, or the happening of some later contingency, but as stated in the case of *In re Lewis' Estate*, 240 S. W. 493,—

“This, however, does not mean that, in order to defeat interest, the Will must contain a provision specifically and in direct terms postponing the payment of the entire legacy to some later time than the law provides where there is an absence of testamentary direction. It is sufficient if, from all the terms and provisions of the Will, it can be clearly seen that the legacies are not to be payable or due until some later time or contingency.”

Or as was stated in *Von der Horst v. Von der Horst*, 88 Md. 127—

“There are, as is well understood, no formal, fixed or technical words that must or need be used to give expression to such an intention and precisely because this is so, great diversity is to be found in adjudged cases where similar questions have been discussed.”

In the case at bar the testator has postponed the time of payment of the legacies in question and in addition to that there is apparent a clear indication on his part that no interest should be paid on said legacies.

(f) *Point that the words payment “in full” indicated an intention that the legacies should bear interest* (Brief for Appellant Cora Hamilton Knox, p. 13.)

In the closing clause of Item Eighteenth the testator provided for the scaling down of the legacies therein in case there was not enough left over "to pay them in full," after paying all debts and previous bequests, and in the opening clause of Item Nineteenth he bequeaths to his Trustee for certain purposes, all the remainder of his estate after the payment "in full" of all legacies hereinbefore provided for, etc. Appellants eagerly grasp the word "in full" as thus used and attempt to read into them a meaning on the part of the testator that interest should be paid on the legacies in Item Eighteenth. It is not apparent how the words "in full" as used in Item Eighteenth could have reference to anything other than the amounts expressly mentioned by the testator therein, especially when it is considered that he very obviously had in mind the possible necessity of scaling down those amounts and had theretofore (Item Fourteenth) expressly provided for interest where he intended that it should be added to the legacies. And in Item Nineteenth the words "in full" refer back to all legacies that had gone before, and could mean only that interest-bearing and non-interest-bearing legacies were to be paid in full before any part of the fund from which they were to be paid could pass under the residuary clause.

It must of course be conceded that the testator intended that all legacies, interest-bearing and non-interest-bearing, should be paid in full, if possible, at the time he intended them to be payable and that the law would furnish the intention that interest should be paid from that time if a different intention did not appear from the Will. But the law gives the legatee no right to interest independent of the Will, and it can not be said that the testator deprives the legatee of anything

to which he is entitled if he chooses not to give him interest on his legacy. And it can not reasonably be held that where a testator indicates that certain legacies are to be payable at some time in the future, or upon the happening of some contingency such as, if and when principal of the estate becomes available, therefor (see *Parkhurst v. Ginn, supra.*), the testator intended that the legacies should bear interest *before* that time, or that they should bear interest at all in the face of the fact that where he intended that postponed legacies should bear interest he expressly so provided. If the testator intended that the secondary legatees should receive interest, he could easily have so provided therefor by the insertion in the appropriate place of the words "with interest at the rate of 5% (or 6%) per annum." And it is not reasonable to say that he would have deliberately left the matter in doubt by the omission of some such words if he intended that the legacies should bear interest.

The case of *Taylor v. Drury*, 54 W. L. R. 425, 426, cited on p. 13, Brief for Appellant Cora Hamilton Knox, Executrix, we respectfully submit, is not in point. In that case the testatrix devised a piece of real property in fee to two persons named after "first satisfying a mortgage of \$1,000, held by Clara B. Taylor." This court held that upon a sale of the property the mortgage deed of \$1,000 should be paid with interest at 6% per annum from the date of the note until the time of its payment. The note was expressly payable with interest. It represented a debt acknowledged by the testatrix and which she was at least morally bound to pay, although the statute of limitations had run against it, and it was a direct lien on the property. The testatrix directed that the mortgage

be satisfied, with apparently nothing whatever anywhere in the will to indicate that it was her intention to deny the interest which properly attached to the note. There is, we submit, no similarity between such a case and a case like the present, where the testator was disposing of his own property by gifts, not presently payable, and providing for interest expressly where he desired the legacies to carry interest.

(g) *Point that the legatees under Item Eighteenth now stand in the position of creditors.* (Brief for "Certain Appellant Legatees," p. 28.)

As to this point, we may say, first, that it assumes that appellants have shown that the testator intended that the legatees in Item Eighteenth should have interest on their legacies, which we of course deny, and second, that even if they had so shown, and said legatees were in the position of creditors as claimed, then as a creditor is entitled to interest only from the date the indebtedness is due and demandable, as damages for keeping him out of his money, how could these legatees rightfully demand the payment of their legacies before the time the testator intended they should be paid as indicated by his Will? Apart from that consideration, on the theory of damages, the inquiry would seem to be pertinent—How could there be damages for delay in paying legacies which it was impossible to pay because there was no estate out of which to pay them? The legatees in Item Eighteenth may receive their legacies at this time, because by respecting the postponement of sales directed by the testator the Executor has now, for the first time, funds with which to pay

them. If, as already stated, the assets of the estate had been sold heretofore instead of having been held and administered to this time, the estate would have been exhausted and there would have been no estate out of which to pay these legacies.

(h) *Point as to jurisdiction of Probate Court.*

Appellant J. Barrett Carter, Trustee, in his brief, p. 5, cites the case of *Vestry v. Bostwick*, 8 App. D. C. 452, to the proposition that the court below as a probate court has no power to construe the will in order to ascertain whether or not interest was payable. The case is also referred to in the brief for the Executor, p. 18.

That case involves simply the question of the admissibility of a paper writing to probate with which the construction of the will had nothing to do.

In *McIntire v. McIntire*, 14 App. D. C. 337, this court, at p. 354, said:

“The power to make settlements, secure legatees, and order distribution of the estate must include, by necessary implication, the power to construe the provisions of the will in so doing. *McLane v. Cropper*, 5 App. D. C. 276, 292; *Sinnott v. Kenaday*, 12 App. D. C. 115, 121.” See also same case in 179 U. S. 606.

The question in the case at bar is what the legatees under Item 88 are entitled to on distribution. Are they entitled to the legacies as expressed in Item Eighteenth, or are they entitled to the legacies with interest thereon at the rate of 6% per annum? To ascer-

tain that, the court found it necessary to examine the will as a whole, and that it necessarily had the power to do that, we submit, is conclusively established by the cases just cited.

(i) *Certain points in brief on behalf of Cora Hamilton Knox, Executrix.*

On p. 12 of the brief for Appellant Cora Hamilton Knox, Executrix, it is said that:

“It is simply and solely a question whether, however long the time might be—eighteen years or eighteen hundred years—that accumulation by way of income, profit or increment is to go entirely to the second deferred legatee without regard to those for whom the testator has shown a preference by giving general legacies to them, and solely by withholding the payment of which the fund in controversy has been created, or whether it is to be divided between these classes on some equitable basis.”

We respectfully submit that that is not the question at all. The suggestion that the fund from which the legatees under Item Eighteenth are now being paid resulted from withholding from them that to which they were entitled erroneously assumes that there was a fund in existence out of which they could have been paid heretofore. The record shows that if the Estate had been closed at any time up to very recently neither the legatees under Item Eighteenth nor the residuary legatee under Item Nineteenth would have received anything, as the very source from which these legacies were to be paid did not come into being until all the

preferred legacies were satisfied, together with the interest which the testator had expressly provided for them. The available estate for the payment of these legacies which exists today exists solely because of the time that was taken to build it up, and it was not built up by any income or interest on any existing fund or asset. The fact that there is a fund at all is due to the growth or increase in the value of the properties of the estate by exploitation and development through a period of years. Practically all the legatees under Item Eighteenth have now been paid their legacies in full as intended by the testator. By claiming interest for the years during which the estate to pay their legacies was in the making, they are attempting to take away, under the guise of interest on a fund which never heretofore existed, the greater part, if not practically all of that part, of the testator's Estate which he intended should be placed in trust for the construction of a sanitarium.

In the brief of the same Appellant, Cora Hamilton Knox, Executrix, it is stated (p. 9) that our contention against the allowance of interest is rested entirely upon the intention of the testator as deduced from the "solitary fact" that his Will specified interest at the rate of 5% per annum to be paid upon the legacies contained in the Items prior to Item Eighteenth, and said nothing about interest in that Item. Then, having made this erroneous statement, it is suggested by that Appellant that the testator was moved to provide expressly for interest on the legacies thus preferred because of a doubt in his mind as to whether they would otherwise receive both principal and interest, as he intended, before his less preferred legatees were paid anything. In the first place, if we accept that

theory, it is difficult to understand why a solicitude which moved the testator to the extent of expressly providing that his widow, his relatives, and those to whom he declared himself under obligation, should receive their legacies *and interest thereon* before those to whom he was under no obligations should receive anything at all, would at the same time impel him to knowingly and intentionally give such preferred legatees a less rate of interest than those not so preferred. In the second place, we contended in the court below and contend here that the provisions of the Will itself, and especially when considered in connection with the character of the estate disposed of, shows clearly that the testator contemplated that the payment of the legacies in question was to be postponed and that the rule relied on by appellants can not apply in such a case.

As was said by the court below,—

“If the testator had intended that the eighty-eight legatees should receive interest on their delayed legacies it would have been a simple matter for him to have so provided. That the subject of interest on legacies was in his mind when he made his will is plain by the provisions that he made for the payment of such interest on his preferred legacies, his wife first, and then the legatees provided for in Eighth, Ninth, Tenth, Eleventh and Thirteenth Paragraphs or Items of his Will. It is evident also that he contemplated the possibility, if not the probability, of delay in the payment of some of the preferred legacies, and evidently he did not desire that they should suffer from delay in the receipt of that which his bounty provided. It may be argued that he omitted any provision for the payment of inter-

est on the eighty-eight legacies on the theory that he would let them get what the law allows in such a case, but if that were so, we should have the singular result that his preferred legatees should get but five per centum on their delayed legacies while those who were to benefit only after those preferred legacies were paid should, in addition to the principal, receive interest at a greater rate, a result that hardly can be deduced or inferred as his intention when we consider the whole structure of his will and his purposes and intent with respect to those who were the preferred objects of his bounty."

CONCLUSION

We see no occasion for discussing the brief filed on behalf of the Executor. Such authorities as are cited and discussed therein we believe have already been fully covered.

It is respectfully submitted that the decision of the lower court correctly interprets the intention of the testator and that said decision should be affirmed.

FRANK J. HOGAN,

WM. H. DONOVAN,

Attorneys for Appellee

*Michigan Sanitarium and Benevolent
Association, of Battle Creek, Mich.,
as Residuary Legatee.*

STANTON C. PEELLE,

DALE D. DRAIN,

*Attorneys for Certain Appellee Heirs
at Law and Next of Kin.*

PEELLE, OGILBY & LESH,

Of Counsel

